The Constitutional Court and Democracy in Indonesia

Simon Butt

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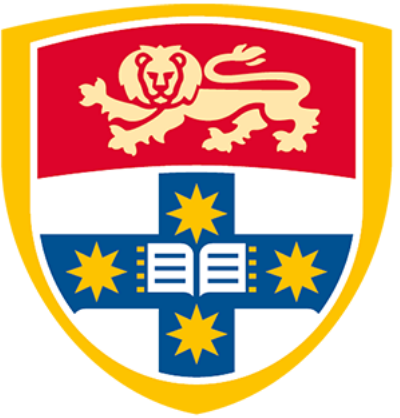

THE UNIVERSITY OF
SYDNEY

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By

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NIJHOFF

LEIDEN | BOSTON

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About this Book

This book is the culmination of over a decade's research on Indonesia's Constitutional Court, beginning when I commenced my doctorate at Melbourne Law School in 2002. After completing, I joined Sydney Law School, where, through an Australian Research Council Postdoctoral Fellowship (DP110104287) and significant Faculty support, I was able to continue this research. I am very grateful for the funding and support I have received. I also acknowledge the fantastic research assistants that have worked with me on Indonesia's Constitutional Court over the years and on this book, including Arjuna Dibley, Diana Hu, Nicolas Parsons and Fritz Edward Siregar.

In this book, I have eschewed some traditions of Indonesian legal writing. Indonesian judicial decisions are almost always referred to by case number. For readability, I have chosen to give most cases a title – usually the name of an applicant, the electoral district in which the dispute emerged, a shortened title of the statute under review or the main issue raised by the case. I also include the year in which the case was lodged with the Court, rather than the year in which the case was decided. Similarly, I have not provided full numerical references to statues and other types of laws in the main text, instead giving them a short title. Full references are provided in the 'List of Cases' and 'List of Legal Instruments'.

The Court produces English-language translations, but only for a small portion of its decisions. All references to page or paragraph numbers in Constitutional Court judgments are references to the original Indonesian-language versions. Unless otherwise indicated, all translations are mine.

I dedicate this book to three mentors who have shaped my thinking and writing over the years. The first is my father, Emeritus Professor Peter Butt, who, besides everything else, taught me how to write. The second is Professor MB Hooker, the great *doyen* of Islamic and customary law in Indonesia and wider Southeast Asia, who set me on this path as an undergraduate student at the Australian National University. Last, but certainly not least, is Professor Tim Lindsey, great friend and collaborator.

Simon Butt
Sydney
December 2014

Commonly-used Acronyms and Abbreviations

Bawaslu (Badan Pengawas Pemilihan Umum)	Election Supervisory Board
Bupati	Regent (head of a kabupaten or county)
DPD (Dewan Perwakilan Daerah)	Regional Representative Assembly
DPR (Dewan Perwakilan Rakyat)	People's Representative Assembly
DPRD (Dewan Perwakilan Rakyat Daerah)	Regional People's Representative Assembly
Golkar (Golongan Karya)	Golkar (literally, 'Functional Groups' – political party established by former President Soeharto)
KPK (Komisi Pemberantasan Korupsi)	Corruption Eradication Commission
KPU (Komisi Pemilihan Umum)	General Electoral Commission
KTP (Kartu Tanda Penduduk)	identity card
migas (minyak dan gas bumi)	oil and natural gas
MK (Mahkamah Konstitusi)	Constitutional Court
MPR (Majelis Permusyawaratan Rakyat)	People's Consultative Assembly
Perda (Peraturan Daerah)	Regional Regulation
Perpu (Peraturan Pemerintah Pengganti Undang-Undang)	Interim Emergency Law (literally, 'Government Regulation in Lieu of Statute')
Pemilu (Pemilihan umum)	Election
Pemilukada (Pemilihan umum kepala daerah)	Regional head election

Glossary and Abbreviations

adat	customary law
amar putusan	holding
asas bebas	principle of freedom
asas precedent	principle of precedent
Badan Penyelidikan Usaha Persiapan Kemerdekaan	Investigating Committee for the Preparation of Independence
Bawaslu (Badan Pengawas Pemilihan Umum)	Election Supervisory Board
Bilangan Pembagi Pemilu	Vote Division Number
BP Migas (Badan Pelaksana Kegiatan Usaha Hulu Minyak dan Gas)	National Upstream Oil and Gas Implementing Agency
Bupati	Regent (head of a kabupaten or county)
Daftar Inventaris Masalah	Inventory of Issues
Daftar Pemilih Tepat	Electoral Roll
Daftar Pemilih Tambahan	Supplementary Electoral Roll
dalam hal ihwal kegentingan yang memaksa	pressing emergency circumstances
Demokrasi Terpimpin	Guided Democracy
Dewan Kehormatan Penyelenggara Pemilu (DKPP)	Electoral Administration Honour Council
dibiarkan	allowed
dibiarkan adanya	allowed to exist
dimaknai	given a specified meaning
DPD (Dewan Perwakilan Daerah)	Regional Representative Assembly
DPR (Dewan Perwakilan Rakyat)	People's Representative Assembly
DPRD (Dewan Perwakilan Rakyat Daerah)	Regional People's Representative Assembly
Dwifungsi	Dual function (of the military)
ekonomi Syari'ah	Islamic economy
fiqh	Islamic jurisprudence
Gerindra (Partai Gerakan Indonesia Raya)	Greater Indonesia Movement Party
Golkar (Golongan Karya)	Golkar (literally, 'Functional Groups' – political party established by former President Soeharto)
hak	right
hak angket	right to summon and question individuals

hak untuk hidup	right to life
Hanura (Partai Hati Nurani Rakyat)	People's Conscience Party
hibah	bequest
hukum revolusi	revolutionary law
ICW	Indonesia Corruption Watch
ikut membahas	participate in deliberating
IMF	International Monetary Fund
infaq	charitable gift
Instruksi Presiden	Presidential Instruction
jantung	heart
Kabupaten	County
kartu keluarga	family card
kartu tanda penduk	identity card
kasasi	cassation
keadilan	justice
keadilan social	social justice
Kecamatan	Sub-district
kedaulatan rakyat	the people's sovereignty
kedudukan hukum	legal standing
kemanfaat	utility
Kemanusiaan Yang Adil dan Beradab	A Just and Civilised Humanity
Kepala Daerah	Regional Head
Kepala Desa	Village Head
kepastian hukum	legal certainty
Keputusan	Decision
Keputusan Menteri	Ministerial Decision
Keputusan Presiden	Presidential Decision
Ketuhanan yang Maha Esa	Belief in Almighty God
kewenangan atributif yang bersifat mutlak	absolute direction
Kewenangan Mahkamah	Jurisdiction of the Court
Kitab Undang-Undang Hukum Acara Pidana (KUHAP)	Criminal Procedure Code
Komisi Pemberantasan Korupsi (KPK)	Anti-corruption Commission
Komisi Pemeriksa Kekayaan Penyelenggara Negara (KPKPN)	Public Official Asset Investigation Commission
Komisi Pemilihan Umum	General Election Commission
Konsorsium Reformasi Hukum Nasional (KRHN)	National Legal Reform Consortium
Konstituante	Constituent Assembly

Konstitusi Baru	New Constitution
kota	city
Lembaga Bantuan Hukum (LBH)	Indonesian Legal Aid Institute
Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP)	Institute of Advocacy and Study for an Independent Judiciary
Mahkamah Agung	Supreme Court
Mahkamah Kalkulator	Calculator Court
Mahkamah Konstitusi	Constitutional Court
Majelis Kehormatan Hakim Konstitusi	Constitutional Court Judge Honour Council
Majelis Kehormatan Mahkamah Konstitusi	Constitutional Court Honour Council
melantik	inaugurate
membantah	refute
memberikan pertimbangan	give advice
mempertimbangkan	consider
memutus perselisihan tentang hasil pemilihan	resolve disputes about election results
mengabulkan	uphold
mengadili	decide
mengesampingkan	set aside
mengingatkan	warn
menimbang	considering or whereas
menimbang bahwa	considering that
migas (minyak dan gas bumi)	oil and natural gas
MK (Mahkamah Konstitusi)	Constitutional Court
MPR (Majelis Permusyawaratan Rakyat)	People's Consultative Assembly
mulai dari nol	start from scratch
Nahdlatul Ulama	Name of an Islamic group
Negara Hukum	Law State
nilai-nilai kesusilaan	values of propriety
noken	traditional bag made from bark
noken gantung	hanging bag
Otonomi Daerah	Regional Autonomy
Pancasila	Indonesia's state philosophy (literally, 'The Five Principles')
Panitia Pemilihan Luar Negeri	Overseas Election Committee
Pansus	Special Committee
Panwaslu (Panitia Pengawasan Pemilu)	electoral supervisory committee
para pemohon	applicants

Partai Aceh	Aceh Party
Partai Amanat Nasional	National Mandate Party
Partai Barisan Nasional	National Front Party
Partai Bersatu Atjeh	Unified Aceh Party
Partai Bintang Reformasi	Reform Star Party
Partai Bulan Bintang	Crescent Star Party
Partai Buruh	Labour Party
Partai Buruh Sosial Demokrat	Labourers' Social Democrat Party
Partai Demokrasi Indonesia	Indonesian Democratic Party
Partai Demokrasi Indonesia – Perjuangan	Indonesian Democratic Party of Struggle
Partai Demokrasi Pembaruan	Democratic Renewal Party
Partai Demokrat	Democrat Party
Partai Indonesia Sejahtera	Prosperous Indonesia Party
Partai Karya Peduli Bangsa	Concern for the National Work Party
Partai Kasih Demokrasi Indonesia	Indonesia Democracy-Lovers' Party
Partai Kebangkitan Bangsa	National Awakening Party
Partai Kebangkitan Nasional Ulama	Ulama National Awakening Party
Partai Komunis Indonesia	Indonesian Communist Party
Partai Merdeka	Independence Party
Partai Nasionalis Banteng Kemerdekaan	Indonesian Independent Nationalist Ox Party
Partai Peduli Raykat Nasional	National People's Concern Party
Partai Pelopor	Pioneer Party
Partai Penegak Demokrasi Indonesia	Indonesian Democracy Enforcer Party
Partai Pengusaha dan Pekerja Indonesia	Indonesian Businessperson's and Worker's Party
Partai Perhimpunan Indonesia Baru	New Indonesia Alliance Party
Partai Perjuangan Indonesia Baru	New Indonesian Party of Struggle
Partai Persatuan Nahdlatul Ummah Indonesia	Indonesian Nahdlatul Community Party
Partai Persatuan Pembangunan	United Development Party
Partai Persatuan Rakyat Indonesia	Indonesian People's Unity Party
Partai Republika Nusantara	Archipelago Republican Party
pembangunan	economic development
pemberhentian dengan hormat	honourable discharge
pemberhentian dengan tidak hormat	dishonourable dismissal
pemekaran	splitting
pemilihan diwakilkan	represented voting

pemilihan ulang	re-election
Pemilu (Pemilihan umum)	Election
Pemilukada (Pemilihan umum kepala daerah)	Regional head election
Pendapat Mahkamah	Opinion of the Court
pendapat mini	mini opinion
penetapan hasil pemilihan umum	stipulation of the election result
penetapan provisi	provisional order
pengantar musyawarah	introduction to deliberation
penggelembungan	inflation
penggembosan	reduction or deflation
penghitungan ulang	Recount
pengurus lengkap	complete executive
peninjauan kembali	reconsideration (reopening and review of a case by the Supreme Court)
penjabaran	elaboration or extension
penyelidikan	preliminary enquiry
penyidikan	investigation
Peraturan	Regulation
Peraturan Daerah (Perda)	Regional Regulation
Peraturan Desa	Village Regulation
Peraturan Menteri	Ministerial Regulation
Peraturan Pemerintah	Government Regulation
Peraturan Presiden	Presidential Regulation
perbuatan	act
Perhimpunan Bantuan Hukum Indonesia (PBHI)	Indonesian Legal Aid and Human Rights Association
perkawinan	marriage
perlakuan khusus	special measures or treatment
Perludem (Perkumpulan Untuk Pemilu dan Demokrasi)	Association for Elections and Democracy
Perpu (Peraturan Pemerintah sebagai Pengganti Undang-undang)	Interim Emergency Law (literally 'Government Regulations in lieu of a Statute')
Persatuan Indonesia	The Unity of Indonesia
persebaran perolehan suara	spread of votes
Pertimbangan Hukum	Legal Considerations
Perusahaan Listrik Negara	National Electricity Company
peserta pemilu	election participants

pihak terkait	related parties
PNI Marhaenisme	Indonesian National Marhaenism Party
Program Legislasi Nasional (Prolegnas)	National Legislation Programme
Propinsi	Province
Pusat Studi Hukum dan Kebijakan (PSHK)	Centre for the Study of Law and Public Policy
putusan	decision
Qanun	Regional Regulation (Aceh)
qoth'i	convincing and certain
Rakyat	The People
rambu	Pillar
Rechtsstaat	Law State
rekapitsulasi	recapitulation
rezim	regime
serentak	simultaneous
setiap orang	every person
shadaqah	gift to the needy
sisa suara	surplus votes
stabilitas	stability
tidak beralasan hukum	without legal merit
Tim Sukses	Support Team
tindak pidana khusus	special crime
tipikor	corruption crime
TNI (Tentara Nasional Indonesia)	Indonesian Army
Trias Politika	Political Triad – separation of powers
Ulama	Islamic scholar
undang-undang	statute
Undang-undang Dasar	Constitution
Walikota	Mayor
waris	succession
Yayasan Lembaga Bantuan Hukum Indonesia (YLBHI)	Indonesian Legal Aid Institute Foundation
yurisprudensi	jurisprudence
zakat	payment of alms

List of Cited Legal Instruments

Commonly-cited Constitutional Provisions

Article	Text of Constitution
1(2)	Sovereignty is in the hands of the people and is exercised in accordance with the Constitution.
6(1)	Candidates for president and vice-president must be Indonesian citizens from birth; have never, by choice, held citizenship of another country; have never committed treason; and be physically and mentally able to perform the functions and obligations of president or vice-president.
6A(2)	Presidential and vice-presidential pairs are to be proposed by political parties or coalitions of political parties who are participants in the general election before the general election is held.
18(3)	Provincial, county and city administrations have DPRDs whose members are chosen by general election.
18(4)	Governors, Regents and Mayors are heads of provincial, county and city governments respectively, and are to be elected democratically.
22E(1)	General elections are to be direct, public, free, secret, honest, and fair, and held every five years.
22E(2)	General elections are held to elect members to the DPR, DPD and the DPRD, and to elect the president and vice-president.
22E(3)	Contestants of DPR and DPRD elections are political parties.
27(1)	All citizens have an equal status in the law and government and must uphold the law and government without exception.
28C(2)	All people have the right to put themselves forward and to collectively struggle for their rights to develop the community, nation and state.
28D(1)	All people have the right to recognition, guarantees, protection, legal certainty which is just and equal treatment before the law.
28D(3)	Every citizen has the right to obtain the same opportunity in government.
28E(3)	Every person has the right to the freedom to associate, to assemble and to express an opinion.
28H(2)	Every person has the right to obtain facilitation or special treatment to obtain the same opportunities and benefits in order to achieve equality and justice.

28I(1)	The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognised as an individual before the law, and the right not to be prosecuted under a law of retrospective application are human rights that cannot be limited under any circumstances.
28I(2)	Everyone has the right to be free from discrimination.
28 J(2)	In exercising their rights and freedoms, every person must submit to limitations stipulated by statute with the sole intent of protecting the rights and freedoms of others and which accords with moral considerations, religious values, security and public order in a democratic society.
33(2)	Branches of production that are important to the state, and that affect the public's necessities of life, are to be controlled by the state.
33(3)	The earth and water and the natural resources contained within them are to be controlled by the state and used for the greatest possible prosperity of the people.

Statutes and Emergency Laws

1964 Execution Procedures Law	Law 2/PNPS/1964 on Procedures for Carrying Out Executions
1964 Judicial Power Law	Law 19 of 1964 on Judicial Power
1965 Blasphemy Law	Law 1/PNPS/1965 on the Prevention of the Misuse/Insulting of a Religion
1970 Judiciary Law	Law 14 of 1970 on Judicial Power
1974 Marriage Law	Law 1 of 1974 on Marriage
1974 Public Service Employment Law	Law 8 of 1974 on Public Service Employment
1985 Electricity Law	Law 15 of 1985 on Electricity
1985 Supreme Court Law	Law 1 of 1985 on the Supreme Court
1989 Religious Courts Law	Law 7 of 1989 on the Religious Courts
1997 Narcotics Law	Law 22 of 1997 on Narcotics
1998 Bankruptcy Law	Law 4 of 1998 on Bankruptcy
1999 Amendments to the 1974 Public Service Employment Law	Law 43 of 1999 Amending Law 8 of 1974 on Public Service Employment
1999 Fiscal Balance Law	Law 25 of 1999 on Fiscal Balance between the Central and Regional Governments
1999 General Elections Law	Law 3 of 1999 on General Elections for Members of the DPR, DPD, and DPRDs
1999 Human Rights Law	Law 39 of 1999 on Human Rights

1999 Political Parties Law	Law 2 of 1999 on Political Parties
1999 Regional Government Law	Law 22 of 1999 on Regional Government
1999 Representative Institutions Law	Law 4 of 1999 on the Composition of the MPR, the DPR and DPRDs
2000 Human Rights Courts Law	Law 26 of 2000 on the Human Rights Courts
2001 Oil and Natural Gas Law	Law 22 of 2001 on Oil and Natural Gas
2002 Broadcasting Law	Law 32 of 2002 on Broadcasting
2002 Electricity Law	Law 30 of 2002 on Electricity
2002 Indonesian Police Force Law	Law 2 of 2002 on the Indonesian Police Force
2002 KPK Law	Law 30 of 2002 on the Corruption Eradication Commission (the *Komisi Pemberantasan Korupsi*, or KPK)
2002 Political Parties Law	Law 31 of 2002 on Political Parties
2003 Constitutional Court Law	Law 24 of 2003
2003 General Elections Law	Law 12 of 2003 on General Elections for Members of the DPR, DPD, and DPRDs
2003 Labour Law	Law 13 of 2003 on Labour
2003 Law on the Formation of the County of West Sumbawa	Law 30 of 2003 on the Formation of the County of West Sumbawa in the Province of West Nusa Tenggara
2003 Presidential Election Law	Law 23 of 2003 on the Election of the President and Vice-President
2003 Representative Institutions Law	Law 22 of 2003 on the Organisation and Position of the MPR, DPR, DPD and DPRD
2004 Bankruptcy Law	Law 37 of 2004 on Bankruptcy and Deferral of Debt Payment Obligations
2004 Indonesian Armed Forces Law	Law 34 of 2004 on the Indonesian Armed Forces
2004 Judicial Power Law	Law 4 of 2004 on Judicial Power
2004 Public Prosecution Law	Law 16 of 2004 on the Public Prosecution
2004 Regional Government Law	Law 32 of 2004 on Regional Government
2004 Water Resources Law	Law 7 of 2004 on Water Resources
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2006 National Audit Agency Law	Law 15 of 2006 on the National Audit Agency
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Emergency Law 1 of 2013	Emergency Law 1 of 2013 on the Second Amendment to Law 24 of 2003 on the Constitutional Court
Emergency Law 12/Drt/1951	Emergency Law 12/Drt/1951 on Amendments to Ordonnantietijdelijke Bijzondere Strafbepalingen
Emergency Law 2 of 2002	Emergency Law 2 of 2002 on the Application of Interim Emergency Law 1 of 2002 on the Eradication of the Crime of Terrorism to the Bali bomb explosion of 12 October 2002
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Law 12 of 2005	Law 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights
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Law 16 of 2003	Law 16 of 2003 on the Stipulation of Interim Emergency Law 2 of 2002 on the Application of Interim Emergency Law 1 of 2002 on the Eradication of the Crime of Terrorism in the Bali Bomb Explosion on 12 October 2002 as a Statute
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Partai Golongan Karya application (2009)	Constitutional Court Decision 94/PHPU.A-VII/2009
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Supreme Court Decision 04 P/KPUD/2005
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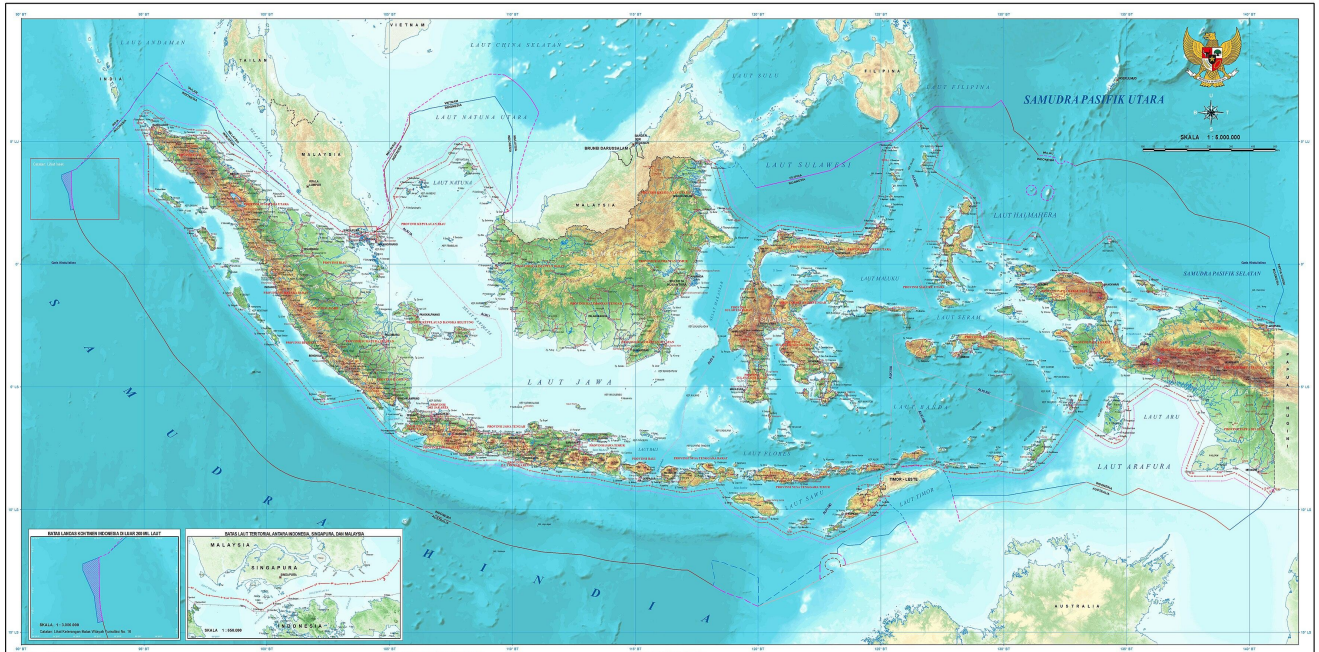
Supreme Court Decision 016 P/HUM/2009

PETA NEGARA KESATUAN REPUBLIK INDONESIA



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Edisi Tahun 2020

Datum Horizontal : Sistem Referensi Geospasial Indonesia 2013 (SRGI 2013)
Datum Vertikal : Earth Gravity Model 2008 (EGM08)

Batas 200 M
Batas ZEE kesepakatan dalam Kod/Dasi
Batas ZEE dan Landas Kontinen
Batas ZEE dan Landas Kontinen Indonesia (230 mil laut)
Batas ZEE dan Landas Kontinen kesepakatan
Batas Laut Teritorial
Batas Laut Teritorial yang kesepakatan
Batas Area Kerjasama
Garis Pangkal
Garis Pantai
Batas Laut Nusantara Indonesia (ALKI)
Batas Wilayah Indonesia di antara Laut Teritorial dan Landas Kontinen ZEE dan Landas Kontinen Zona Ekonomi Eksklusif Indonesia
Batas Wilayah Indonesia di antara Laut Teritorial dan Landas Kontinen ZEE dan Landas Kontinen Zona Ekonomi Eksklusif Indonesia
Batas Wilayah Indonesia di antara Laut Teritorial dan Landas Kontinen
Batas Landas Kontinen kesepakatan Indonesia-Malaysia
Batas Landas Kontinen kesepakatan
Landas Kontinen Indonesia di Luar 200 MIL Laut

Singkatan :

P.	Pulau
Kep.	Kepulauan
S.	Selat
Tg.	Tanjung
P.	Pulau
K.	Kepulauan
Sr.	Siri
T.	Tim
S.	Sangat
K.	Kecil
B.	Barat
T.	Timur
U.	Utara
S.	Selatan

Kedalaman/Ketinggian (meter)

Tanah/Daratan	>1000 m
	200 - 1000 m
	100 - 200 m
	50 - 100 m
	25 - 50 m
	20 - 25 m
	15 - 20 m
	10 - 15 m
	5 - 10 m
	0 - 5 m

Kedalaman :

0 - 25 m	
25 - 50 m	
50 - 100 m	
100 - 200 m	
200 - 500 m	
500 - 1000 m	
1000 - 2000 m	
2000 - 3000 m	
3000 - 4000 m	
>4000 m	

PETA NEGARA KESATUAN REPUBLIK INDONESIA

Peta ini menggambarkan wilayah kedaulatan Negara Kesatuan Republik Indonesia di darat dan laut, baik berupa laut teritorial (laut wilayah), perairan kepulauan, dan perairan pedalaman, serta hak kedaulatan Indonesia di Zona Tambahan, Zona Ekonomi Eksklusif, dan Landas Kontinen. Penggambaran wilayah kedaulatan Indonesia di laut mengacu pada Undang-Undang Republik Indonesia Nomor 6 Tahun 1996 tentang Perairan Indonesia, serta sesuai dengan prinsip-prinsip hukum internasional. Peta ini dibuat berdasarkan batas Negara yang telah disepakati antara Republik Indonesia dengan negara-negara tetangganya.

KONTRIBUTOR

Kementerian Koordinator Bidang Politik, dan Keamanan; Kementerian Koordinator Bidang Pembangunan, Kementerian Dalam Negeri; Kementerian Luar Negeri; Kementerian Pertahanan; Kementerian Hukum; Kementerian Kelautan; Kementerian Energi dan Sumber Daya Mineral; Kementerian Perhubungan; Kementerian Kehutanan; Kementerian Perdagangan; Kementerian Perindustrian; Kementerian Kelautan dan Perikanan; Kepolisian Negara Republik Indonesia; Badan Koordinasi Laut Republik Indonesia; Badan Informasi Geospasial; Badan Riset dan Inovasi Nasional; Badan Pusat Statistik; Dan Pemerintah Daerah.

SUMBER DATA

1. Keputusan Presiden RI/ Nomor 154 Tahun 2000 tentang Penetapan Data Geospasial Dasar dan Peta Rupabumi Indonesia Skala Tetap.
2. Keputusan Kepala BIG Nomor 239 Tahun 2020 tentang Penetapan Garis Pantai Untuk Wilayah Negara Kesatuan Republik Indonesia Edisi Tahun 2019.
3. Sistem Referensi Geospasial Nasional (SRGN) versi 2.0 dan ICSTRO v1 ver2.2.0.
4. Data batas sebuah kabupaten/kota adalah batas daerah otonom sebagaimana Peraturan Menteri Dalam Negeri.
5. Peta Rupabumi Indonesia (RBI) skala 1:250.000 dan 1:1.000.000, Badan Informasi Geospasial, Cibinong, Jawa Barat, Indonesia.
6. Peta Laut Kepulauan Indonesia (ALKI) skala 1:500.000 dan 1:1.000.000, SYAHROOL704-KL, 2015.
7. Peta Zona Ekonomi Eksklusif Wilayah Kepulauan Indonesia skala 1 : 1.000.000, SYAHROOL704-KL, 2015.
8. Peta Garis Pangkal Wilayah Negara Kepulauan Indonesia skala 1 : 350.000, SYAHROOL704-KL, 2015.
9. Peta Batas Maritim Indonesia dengan Negara Tetangga.

Catatan : Untuk penentuan posisi pulau-pulau terluar Indonesia, digunakan Jaringan Pusaran Pemetaan Nomor 38 Tahun 2002 tentang Daftar Koordinat Geografi titik-Titik Garis Pangkal Kepulauan Indonesia sebagaimana telah diubah dengan Peraturan Pemerintah Nomor 37 Tahun 2008 tentang Perubahan Atas Peraturan Pemerintah Nomor 38 Tahun 2002 tentang Daftar Koordinat Geografi Titik-Titik Garis Pangkal Kepulauan Indonesia.

10. Peta Rupabumi Indonesia (RBI) skala 1:25.000, Badan Informasi Geospasial, Cibinong, Jawa Barat, Indonesia.
11. Keputusan Presiden Nomor 17 Tahun 2016 tentang Penetapan Garis Pangkal Kepulauan Alur-Kepulauan Kepulauan Sebatik, Pulau Sebatik, Dan Pulau Sebatik Bagian Timur.

SUMBER DATA

1. Keputusan Presiden RI/ Nomor 154 Tahun 2000 tentang Penetapan Data Geospasial Dasar dan Peta Rupabumi Indonesia Skala Tetap.
2. Keputusan Kepala BIG Nomor 239 Tahun 2020 tentang Penetapan Garis Pantai Untuk Wilayah Negara Kesatuan Republik Indonesia Edisi Tahun 2019.
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10. Peta Rupabumi Indonesia (RBI) skala 1:25.000, Badan Informasi Geospasial, Cibinong, Jawa Barat, Indonesia.
11. Keputusan Presiden Nomor 17 Tahun 2016 tentang Penetapan Garis Pangkal Kepulauan Alur-Kepulauan Kepulauan Sebatik, Pulau Sebatik, Dan Pulau Sebatik Bagian Timur.
12. Undang-Undang Nomor 21 Tahun 2001 tentang Otonomi Khusus Bagi Provinsi Papua.
13. Undang-Undang Nomor 11 Tahun 2006 tentang Pemerintahan Aceh.
14. Undang-Undang Nomor 23 Tahun 2014 tentang Pemerintahan Daerah.
15. Undang-Undang Nomor 1 Tahun 2017 tentang Perubahan Kedua Undang-Undang Nomor 23 Tahun 2006 tentang Administrasi Kependudukan.
16. Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum.
17. Undang-Undang Nomor 6 Tahun 1996 tentang Perairan Indonesia.
18. Undang-Undang Nomor 43 Tahun 2008 tentang Wilayah Negara.

NEGARA KESATUAN REPUBLIK INDONESIA

Negara Kesatuan Republik Indonesia (NKRI) merupakan Negara Kepulauan (Archipelagic State) yang berbatasan dengan 10 (sepuluh) negara, 3 (tiga), Indonesia berbatasan dengan Malaysia, Papua Nugini, dan Timor-Leste, Sebanyak 41 laut, Indonesia berbatasan dengan India, Malaysia, Singapura, Filipina, Vietnam, Palau, Papua Nugini, Australia, dan Timor-Leste.

I. WILAYAH DARAT NKRI

Wilayah darat NKRI terdiri atas daratan pada semua pulau yang tersebar di wilayah dalam garis pangkal Kepulauan Indonesia. Khusus di P. Kalimantan, P. Sebatik, P. Papua dan P. Timor berbatasan dengan perairan sebagai berikut:

1. Batas negara dengan Malaysia di P. Kalimantan dan Sebatik mengacu kepada perjanjian batas antara Pemerintah Inggris dan Pemerintah Belanda tanggal 20 Juni 1891 dan 28 September 1915, Perjanjian Indonesia dan Malaysia tanggal 27 April 1928, 12 Mei 1958, 7 Maret 1970, 10 Juni 1973, 22 Januari 1979, Memorandum of Understanding (MoU) tanggal 26 November 1973 tentang Pengukuran Bersama Batas Darat, Memorandum of Understanding (MoU) tanggal 29 Desember 1976 tentang Pengukuran Bersama Batas Darat, Memorandum of Understanding (MoU) tanggal 29 Desember 1976 tentang Pengukuran Bersama Batas Darat, Exchange of Notes tanggal 10 Juni 1997 dan 29 Juli 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 11 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 12 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 13 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 14 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 15 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 16 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 17 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 18 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 19 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 20 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 21 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 22 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 23 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 24 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 25 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 26 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 27 November 1997 tentang Pengukuran Bersama Batas Darat, Agreement tanggal 28 November 1997 tentang Pengukuran Bersama Batas 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CHAPTER 1

Introduction

Indonesia has come a long way along the path towards democracy since Soeharto stepped aside after serving 32 years as president (1966–1998). Under the authoritarian system Soeharto developed, five-yearly elections were designed to ensure the victory of Soeharto's parliamentary vehicle, Golkar (*Golongan Karya*, or 'functional groups'). Elections involved 'a lot of dirty tricks, with the military, the bureaucracy, and Golkar colluding in all kinds of illegal and improper methods to preserve Soeharto's power' (Nasution, 2011, p. 19).

Unsurprisingly, few, if any, mechanisms were available to challenge the legality of the electoral process, let alone the results. Even parties that survived these 'rigged' elections and obtained seats in parliament were subject to state surveillance and manipulation, rendering them unable to act as effective checks on government power, much less initiate legislation. With a large number of seats also allocated to government appointees, including the military, parliament was little more than a rubber stamp for government policy (Schwarz, 2000, p. 272). Many of the rights associated with democracy – including freedom of speech for both individuals and the press – were strictly curtailed to suppress criticism of the regime (Lubis, 1993; Budiman, 1994). All this Soeharto achieved with military-backed force, both threatened and actual.

However, soon after Soeharto's resignation, his successor, former Vice-President of ten years Bacharuddin Jusuf Habibie, set in motion fundamental constitutional, democratic and decentralisation reforms, many of which have met considerable success (Hosen, 2010). With amendments to the 1945 Constitution made in four annual rounds (1999–2002), Indonesia transformed from one of Southeast Asia's most repressive and centralised political systems to its most decentralised and democratic (see www.freedomhouse.org). By Horowitz's assessment '…if democracy consists of governmental accountability through regular, free, and fair elections, combined with restraints on executive power and guarantees of individual freedom and political pluralism, then Indonesia…met these conditions' (Horowitz, 2013, p. 20). With around 250 million citizens, Indonesia is now the third largest democratic state in the world.

In 1999, Indonesia held its first democratic general elections since 1955. Forty-eight parties contested the 1999 elections, administered by an independent electoral commission – the *Komisi Pemilihan Umum* or KPU. The system has since developed, so that now Indonesians vote every five years to fill their national, provincial and city or county parliaments and a national-level

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regional representative body (the *Dewan Perwakilan Daerah*, or DPD, often inaccurately translated as 'senate').[1] On 9 April 2014, for example, almost 140 million citizens voted in Indonesia's legislative elections at one of almost 500,000 polling stations across Indonesia. At these elections, around 2000 provincial legislative seats, and 17,500 city or county seats were contested (IFES, 2014, pp. 1–2). Since 2004, direct presidential and vice-presidential elections have also been held around three months after legislative elections, though they will probably be held together with national legislative elections from 2019. From 2005, citizens have also directly elected the heads of their local governments in hundreds of cities, counties and provinces (Davidson, 2009, p. 293).

The Constitutional Court (*Mahkamah Konstitusi* or MK), established in 2003, has been at the forefront of this democratic development. The Court may even have slowed what some scholars have identified as an authoritarian reversion or democratic regression,[2] which has occurred in recent years in comparable countries (Diamond, 2008, p. 38). Two of the Court's functions have been particularly important in this regard. This book describes and analyses how the Court has performed them during its first decade, primarily by examining its decisions and decision-making practices.

The first of these functions is 'constitutional review'. This involves the Court assessing whether statutes enacted by Indonesia's national parliament comply with the Constitution and striking down legislation that does not. This function significantly affects democratic practice in Indonesia because the Indonesian Constitution now contains a Bill of Rights, including many internationally-recognised protections. Amongst them are rights commonly associated with democracy, such as freedom of speech and association, and the rights to vote and to participate in government by standing for election. The Court has heard constitutional challenges to statutes that affect these freedoms, including, for example, by imposing candidacy requirements. The Constitution also requires that elections be free and fair. Through constitutional review, the Court has changed Indonesia's electoral statutes, usually to make the system these statutes establish more 'democratic' – that is, to ensure that, as far as possible, the genuine preferences of voters are respected and reflected.

Second, the Court has resolved hundreds of electoral disputes, arising from all types of elections just mentioned. Most of these involved complaints of

1 As we shall see in Chapter 7, the DPD has no powers of legislative veto as do most 'senates'.

2 Liddle, 2002, p. 393; Hadiz, 2003, 2004, p. 20, 2008; Croissant, 2004, p. 200; Merkel and Croissant, 2004; Hadiz and Robison, 2005; Webber, 2006; Weiss, 2007; Carnegie, 2008; Case, 2009; Davidson, 2009, p. 294; Mietzner, 2009.

electoral 'irregularities', ranging from the deliberate and illegal to the inadvertent and unavoidable. In some cases, the Court has replaced the 'official' count with its own; in others, it has even ordered recounts and re-elections.

1 Structure of the Book

I have divided this book into four parts. In Part I, I introduce the Court, beginning with the Court's establishment (Chapter 2). I describe the Court's jurisdiction, the rules on standing, the structure and 'weight' of its decisions, how its decision-making evolved under its first two chief justices, and how the Court's decisions are enforced (Chapter 3). In Part II, I demonstrate how the Court's decision-making and jurisdiction has been constrained – primarily by the legislature and the Court's own practices (Chapters 4 and 5) – but also how the Court itself has expanded its jurisdiction, arguably beyond statutory and constitutional bounds (Chapter 6). In Part III, I discuss constitutional challenges to electoral statutes that the Court decided in its first decade. I begin by introducing the electoral systems these statutes have established and the institutions that administer the elections (Chapter 7). I then describe and critique the cases through which the Court has shaped Indonesia's statutory infrastructure governing legislative elections (Chapter 8) and presidential elections (Chapter 9). Finally, in Part IV, I consider the Court's disputed returns jurisprudence through an analysis of its decisions emerging out the 2004, 2009 and 2014 legislative and presidential elections, and the many regional head election disputes it has heard (Chapter 10).

This book seeks to contribute to the small but growing body of literature that considers the Court's contribution to the 'rule of law' and democratic practice in Indonesia.[3] It examines the principles the Court has developed when interpreting the Constitution and how has it has applied them when performing judicial review of election-related laws and resolving electoral disputes. Surprisingly little has been written about the Court, even in some of the literature focusing on Indonesia's 'new' democracy.[4] Most of this literature mentions only the outcomes of the Court's decisions in electoral and

3 This includes Stockmann, 2007; Indrayana, 2008; Asshiddiqie, 2009; Hendrianto, 2009; Crouch, 2010; Mietzner, 2010; Zhang, 2010; Nasution, 2011; Butt and Lindsey, 2012; Dressel and Mietzner, 2012; Tahyar, 2012; Horowitz, 2013, and some of my own work.

4 See, for example, King, 2003; Ananta, Arifin and Suryadinata, 2005; Heryanto and Hadiz, 2005; Webber, 2006; Ziegenhain, 2008; Boudreau, 2009; Davidson, 2009.

candidacy disputes,[5] though a few authors have also covered the effects of some decisions on the electoral system.[6] However, little research has described or analysed the Court's reasoning when resolving electoral disputes. Even fewer works have outlined the Court's jurisprudence in constitutional review cases, let alone attempted to explain or analyse it.

This book's focus on judicial reasoning assumes that the long-term institutional legitimacy of a court depends on its processes and decisions being both legally justifiable and legally justified (Wells, 1994, p. 81; Markesinis, 2000, p. 294). To maintain public and political trust, a court must demonstrate that its decisions are 'judicial' – that is, impartial and meaningfully distinct from 'political' processes (Stone Sweet, 2000, p. 142) – and that its decisions are shaped or constrained by law (Roux, 2013, p. 14). A court that can demonstrate its objective and consistent application of the law is more likely to be able to deflect allegations that its decisions are overtly political or biased, or that its judges are corruptible. (As we shall see, the Indonesian Constitutional Court has been accused of all of these things.)

By contrast, a court that merely proclaims its decisions without attempting to explain the processes by which it reached them might survive, or even flourish for a time – while it remains publicly popular or its decisions remain politically palatable. But, once the court faces a controversial case, or allegations of judicial impropriety, commentators and citizens will start to question what lies behind the court's decision-making, unless the court can point to convincing legally-based reasons. Worse, without the objectivity and legitimacy that consistent legal reasoning brings, doubts about the professionalism of a *single* judge may lead to doubts about the professionalism of the *entire* court.

2 Introduction to the Constitutional Court

The Constitutional Court was established by statute in August 2003.[7] Soon after, each of the Supreme Court, the national parliament (*Dewan Perwakilan*

5 See, for example, Harijanti and Lindsey, 2006, pp. 148–49; Singh, 2008, p. 106; Tomsa, 2008, p. 217; Ziegenhain, 2008, p. 104; Erb and Sulistiyanto, 2009, p. 30; M. Mahfud, 2009, pp. 20–22; Sukma, 2009, pp. 322, 325–26.

6 Notably, Sherlock, 2009; Mietzner, 2010; Butt and Lindsey, 2012; Horowitz, 2013.

7 The Court's governing law, the 2003 Constitutional Court Law, was passed on 13 August 2003. Provision had been made for the Court's establishment in the third amendment to Indonesia's Constitution, approved on 9 November 2001. The fourth amendment (10 August 2002) required the Constitutional Court to be created by 17 August 2003 and the Supreme Court to exercise its jurisdiction in the meantime (Constitution, Transitional Provisions, Article III).

Raykat, DPR) and the President chose three judges to serve on the Court.[8] These judges were then installed by presidential decree and the Court began accepting cases.

Though the Court's caseload almost exclusively comprises constitutional review cases and electoral disputes, it has three other functions.[9] One of these is 'deciding upon' (*memutuskan*) the dissolution of political parties. In these cases, the government applies to the Court to disband a political party for having an 'ideology, basis, objective, program or activities' that violate the 1945 Constitution.[10] This function it has never exercised. The second is deciding DPR-initiated motions to impeach the president or vice-president. In such cases the Court must 'provide a decision' (*memberikan putusan*) if the DPR alleges that the President or Vice-president has engaged in treason or corruption, other serious crimes or misconduct, or otherwise no longer fulfils the constitutional requirements to hold office. The Court has also never exercised this function. The Court's remaining function is resolving jurisdictional disputes between the state institutions established by the Constitution. The Court hears few of these disputes, and they are not covered in this book.[11]

The Constitutional Court struggled through humble beginnings. In the words of founding Chief Justice Jimly Asshiddiqqie (2008, p. 10) the Court *mulai dari nol* ('started from scratch'), with little more than a copy of the Constitution and the 2003 Constitutional Court Law in hand to support it, and almost no budget (Purwadi, 2006, pp. 168–9). Initially, the Court was housed in the Supreme Court building, without administrative staff, before shifting to a Jakarta hotel (Asshiddiqie, 2004, p. 14). After obtaining funding from the Finance Ministry, the Court then occupied an office complex, holding court sessions in the national parliamentary building and even in national police headquarters (Asshiddiqie, 2008, p. 109). Only in January 2004 could the Court combine its administrative offices and courtroom in a single building, owned by the Communication and Information Ministry. In mid-2005, work began on a grand new Constitutional Court complex in central Jakarta, close to the Presidential Palace, the Supreme Court and government ministries. Two years later, the Court moved into this building and has occupied it ever since.

8 Under Article 24C(3) of the Constitution.

9 Articles 24C(1) and 24C(2) of the Constitution. The Court's jurisdiction is restated in Article 10 of the 2003 Constitutional Court Law.

10 Article 68 of the 2003 Constitutional Court Law.

11 According to Court statistics, available at www.mahkamahkonstitusi.go.id, the Court has heard only 24 such cases between 2004 and 2014.

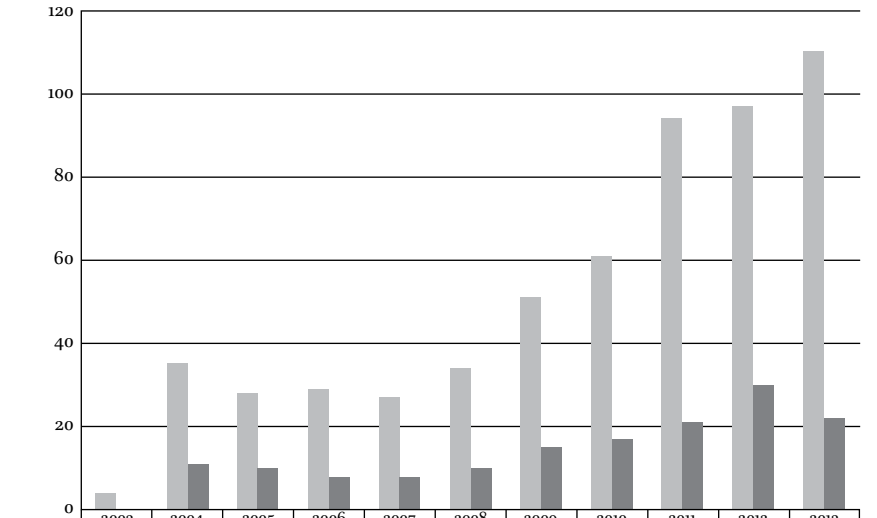
On the whole, assessments of the Court have been largely positive. By most accounts, the Court has performed its functions with professionalism and integrity. Under its first two Chief Justices, Jimly Asshiddiqie (2003–2008) and Mahfud (2008–2013), the Court built a deserved reputation for independence from government and for having far better competence, reliability and impartiality than other Indonesian courts.[12] The Court has also actively exercised its judicial review powers. As for transparency, it is the only Indonesian court to publish its decisions on-line almost immediately after handing them down. The Constitutional Court's decisions are also generally more discursive and better reasoned than those of Indonesia's other courts (Butt, 2007a) and its judges regularly issue dissenting opinions.

With some notable exceptions (Butt and Lindsey, 2008), the government has complied with the Court's decisions, even though the Court lacks formal enforcement powers. This is significant in a political environment where some politicians remain unaccustomed to having their legislative powers checked by an external body and others are openly hostile towards the Court. Similarly, the Court's electoral dispute decisions have been largely respected by electoral participants and citizens, and have rarely caused unrest or further disputation. The Court appears, therefore, to have helped bolster the legitimacy of the elections over which disputes have emerged.

The Court has maintained these standards under significant time pressures. As Figure 1, Figure 2, and Figure 3 show, the Constitutional Court's workload is immense.

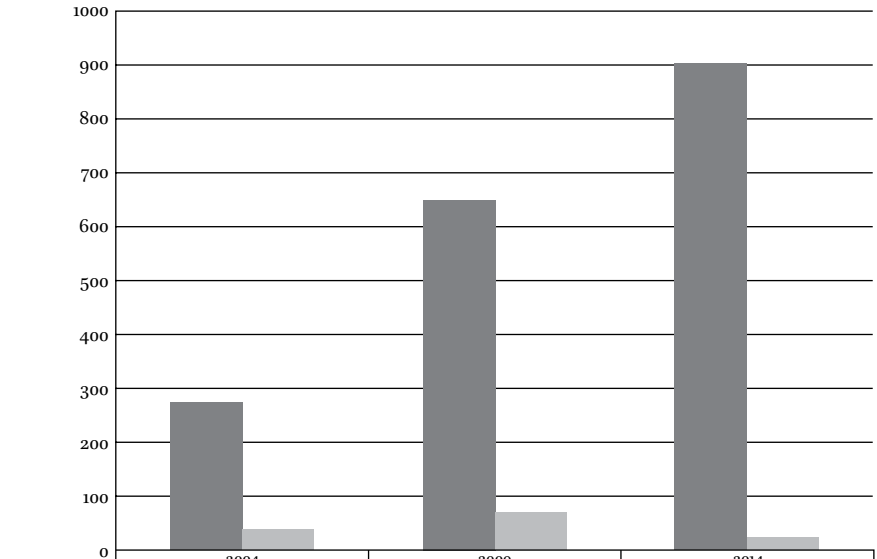
However, despite these achievements and its relative professionalism, the Court is far from perfect. It has been criticised for the less-than-persuasive legal reasoning displayed in some of its decisions and for its apparent failure adequately to test the veracity of evidence upon which it relies (Butt, 2007a, 2013). The Court's integrity has also been brought into question. Most significant was the October 2013 arrest of the Court's third Chief Justice, Akil Mochtar, on corruption charges. In mid-2014, Mochtar was sentenced to life imprisonment for money-laundering and accepting bribes (Rahmi, 2014). This caused

12 With the possible exception of the religious courts, which are known for being corruption-free (Sumner and Lindsey, 2010). As for the Court's independence, Article 24(1) of the Constitution requires that the Constitutional Court be independent in 'upholding the law and justice'. Article 2 of the 2003 Constitutional Court Law states that 'the Constitutional Court is one of the state institutions charged with independently exercising judicial power for the purpose of upholding the law and justice'. Article 12 of the 2003 Constitutional Court Law provides the MK with power to control its non-judicial affairs, including its internal organisation, personnel, administration, and financial management.



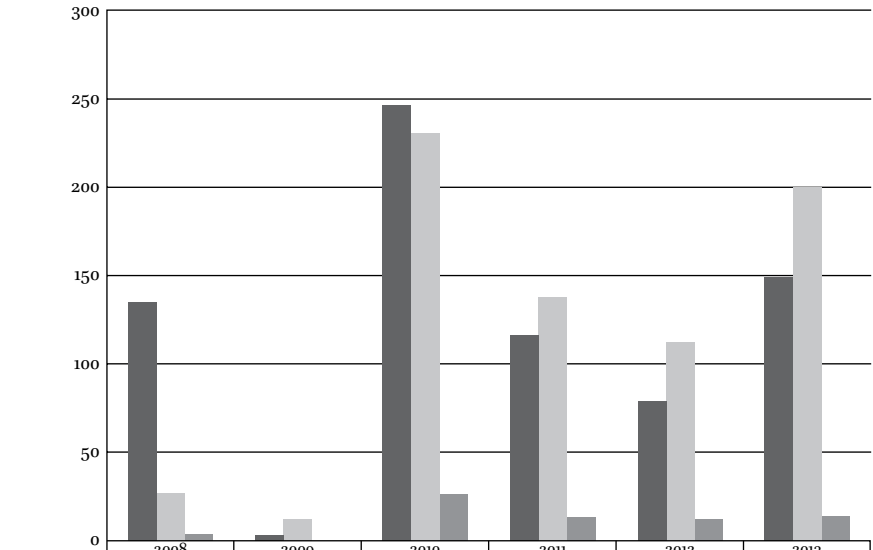
	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Cases	4	35	28	29	27	34	51	61	94	97	110
Granted	0	11	10	8	4	10	15	17	21	30	22

FIGURE 1 *Consistutional review cases*



	2004	2009	2014
Applications	273	650	903
Granted	38	70	23

FIGURE 2 *Legislative election disputes*



	2008	2009	2010	2011	2012	2013
Elections	135	3	246	116	79	149
Applications	27	12	230	138	112	200
Granted	4	0	26	13	12	14

FIGURE 3 *Pemilukada disputes*

the Court significant reputation damage. However, it appears to have regained much of the respect it lost, primarily by professionally handling disputes arising out of the 2014 elections. In particular, the Court received much praise for emphatically rejecting the challenge to the presidential election results brought by Prabowo Subianto and Hatta Rajasa.

PART 1

Introduction to the Indonesian Constitutional Court

PANCASILA

1. KETUHANAN YANG MAHA ESA
2. KEMANUSIAAN YANG ADIL DAN BERADAB
3. PERSATUAN INDONESIA
4. KERAKYATAN YANG DIPIMPIN OLEH HIKMAT KEBIJAK-SANAAN DALAM PERMUSYAWARATAN / PERWAKILAN
5. KEADILAN SOSIAL BAGI SELURUH RAKYAT INDONESIA

CHAPTER 2

Establishment of the Constitutional Court

This Chapter explains why the Constitutional Court was established and granted five particular functions: constitutional or judicial review; deciding on motions to impeach the president or vice-president; dissolving political parties; resolving disputes about the relative jurisdictions of state institutions; and hearing electoral disputes.[1]

Leading accounts point to the 'constitutional crisis' surrounding the impeachment of Indonesia's fourth president, Abdurrahman Wahid, as the primary catalyst for the Court's establishment in the third and final constitutional amendment rounds of 2001 and 2002.[2] In October 1999, the People's Consultative Assembly (MPR or *Majelis Permusyawaratan Rakyat*) – which was then a 700-member body largely comprising members of the national parliament (DPR or *Dewan Perwakilan Rakyat*) – selected Wahid to replace Bacharuddin Jusuf Habibie. (Article 8 of the Constitution required that if the president leaves office, then the Vice-president is installed as President. Habibie was Vice-president when Soeharto stepped down.) Wahid had emerged as a respected figure during the Soeharto era as head of *Nahdlatul Ulama* – a Muslim organisation with around 40 million members (Barton, 2002). However, despite being duly elected by the MPR,[3] Wahid's claim to the presidency was arguably weaker than that of Megawati Soekarnoputri, who had emerged as perhaps the most popular opposition leader in the last few years of Soeharto's rule.[4] The party she led – Indonesian Democratic Party of Struggle (*Partai Demokrasi Indonesia – Perjuangan*, PDI-P) – had obtained 33% of the vote in the 1999 elections, significantly more than any other party. By contrast, Wahid's party – the National Awakening Party (*Partai Kebangkitan Bangsa* or PKB) had won only 13%.[5]

1 Articles 24C(1) and 24C(2) of the 1945 Constitution; Article 10 of the 2003 Constitutional Court Law.

2 These accounts include Lindsey, 2002, p. 244; Widjojanto, 2004, p. 211; Harijanti and Lindsey, 2006, p. 147; Asshiddiqie, 2008, pp. 28–43.

3 By virtue of the third constitutional amendment in 2001, Indonesian presidents are now directly elected (Article 6A of the Constitution). However, Wahid's appointment preceded this amendment, occurring while the MPR still held power to appoint presidents, exercised by ballot.

4 Megawati Soekarnoputri is daughter of Indonesia's first president, Soekarno.

5 Indonesian Electoral Commission website: http://www.kpu.go.id/Sejarah/pemilu1999.shtml.

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Wahid's political authority was weak.

> He never long controlled a significant minority in the newly-strengthened legislature, let alone a majority…Wahid was therefore forced to to go to extraordinary lengths to piece together temporary coalitions to implement even routine decisions or pass laws. …By late 2000, ethnic and religious conflict was growing across the archipelago, Wahid appeared to be losing control of the military, and serious allegations of corruption were being made against him.
>
> BUTT and LINDSEY, 2012, p. 42, citing BARTON 2002, p. 306

In August 2000, a DPR committee investigated Wahid for corruption and, in January 2001, reported that it suspected Wahid's involvement in at least two scandals (Indrayana, 2008, pp. 223, 229). His behaviour became increasingly erratic and his public statements inconsistent, leading his own Cabinet Ministers to begin publicly criticising him (Butt and Lindsey, 2012, p. 45). The DPR attempted to call Wahid to account for his actions and the condition of the state, but Wahid refused, prompting the DPR to convene a special session of the MPR to remove him. There were, however, no clear impeachment mechanisms and, in response, Wahid declared a state of emergency in an effort to dissolve both the MPR and the DPR. However, the military refused to support him (Lindsey, 2002, p. 257). The MPR then convened and, by Decree, replaced Wahid with Megawati.[6] This ended months of political instability and administrative paralysis, during which the MPR's inability to rein in the president it had appointed, and the need for an impartial 'high-level' institution to resolve important matters of state such as these, were brought into sharp relief.

While the Wahid saga was undoubtedly an important trigger for the Constitutional Court's establishment, it was not the sole reason. Many other factors were at play. Some have been identified in the broader comparative constitutional law and political science literature that has emerged to explain why governments introduce judicial review, even though the main purpose of judicial review is to limit government power. These factors range from genuine concerns to protect human rights and maintain democracy; recognition of the practical need for impartial dispute resolution between institutions and tiers of government; global and regional trends; and self-interested elites seeking to protect themselves after democratic transition.

As we shall see in this Chapter, these explanations provide useful starting points for analysis, and some of them appear to help explain why the

6 MPR Decrees II and III of 2001.

Indonesian Constitutional Court was entrusted with particular functions. However, they do not entirely account for the establishment of the Constitutional Court with its five functions. This, I will show, is best explained by a complex culmination of multiple factors unique to Indonesia's political and historical context. The circumstances facing Indonesia when democratic and constitutional reform took place, and how politicians responded to them, significantly contributed to the establishment of the Court. In particular, the timing of constitutional reform – after democratic elections had taken place – was important. Indonesia's post-Soeharto parliament, which led the reforms, comprised both 'reformists' (many of whom were opposition politicians or critics during the Soeharto period) and members associated with the Soeharto regime. Many of the parliamentarians elected in 1999 appeared genuinely concerned to effect 'real' reform. And those who preferred the authoritarian system were compelled to support reforms, including establishing a Constitutional Court. This was because ongoing conflict driven by economic and social factors threatened, at best, to perpetuate unrest and, at worst, to break up Indonesia. At the same time, the structural and ideological barriers to judicial empowerment that Soeharto's New Order put in place became discredited with Soeharto's downfall and largely disappeared. Along with international influences, the result was a more conducive environment for establishing a Constitutional Court than at any other point in Indonesian history.

1 The Introduction of Constitutional Courts and Judicial Review

In the past few decades, most countries of the world, including many in Asia (Croissant, 2010), have introduced constitutional review, often accompanied by the insertion of a bill of rights into their constitutions.[7] In some countries, judicial review is performed by the existing judiciary.[8] However, in around 85%, it is performed by a constitutional court (Stone Sweet, 2012, p. 819). Many of these courts also have election-related jurisdiction (Elkins and Ginsburg, 2009, pp. 1440–1441) and power to review decisions made by parliament to impeach the head of state (Issacharaoff, 2011, p. 972).

7 Ginsberg and Versteeg (2014, p. 587) observe that in 1951, 38% of the world's constitutional systems provided for judicial review, but by 2011 over 80% (more than 150 nations) had adopted it.

8 Within this so-called 'American' or 'decentralised' model, even lower courts may assess the constitutionality of legal norms, with the highest court usually the final arbiter of constitutionality on appeal (Stone Sweet, 2000, pp. 32–34; Croissant, 2010, p. 552).

As mentioned, many comparative constitutional scholars and political scientists have confronted a paradox of judicial review: why do governments choose to introduce it given that it constrains their power?[9] Many scholars point out that the constitutionalisation of rights and judicial review has taken place in successive 'waves', emerging out of ideational concerns to establish and protect human rights and democracy after repressive rule, whether fascist, colonial, communist or authoritarian (Ozbudun, 2006, pp. 214–215).[10] Some have emphasised that for states whose constitutions divide power between institutions and tiers of government, such as federations, constitutional courts play a critical function: to 'police the boundaries' of that power, so that one institution or tier does not exercise or otherwise intrude upon the power of another (Shapiro, 1993, pp. 37, 49). Others identify international influence as an important factor. For example, Stone Sweet and Keller (2008) argue that judicial review has likely proliferated through 'cross-national diffusion of constitutional norms', largely by borrowing and acculturation.[11] Yet others point to the international community's efforts to promote judicial review to 'shore up the rule of law in new and struggling democracies' (Helmke and Rosenbluth, 2009, p. 346).

Ginsburg (2003) and Hirschl (2004) have been at the forefront of debate about why governments introduce judicial review. They claim that rational politicians will establish constitutional review only when in their own interests – that is, when they fear they will lose their power anyway. Ginsburg posits an 'insurance model' to explain the emergence of judicial review in new democracies. He argues that constitution drafters who foresee losing post-reform elections, or at least having to share power with others, attempt to safeguard their future political interests by entrenching judicial review while

9 See, for example, Tate and Torbjörn Vallinder, 1995; Ackerman, 1997; Stone Sweet, 2000, p. 6; Ginsburg, 2003, p. 6; Forbath, 2004, p. 1653; Hirschl, 2004b; Graber, 2006; Ozbudun, 2006, p. 4.

10 The first wave occurred in response to the democratically-elected fascist regimes of Italy and Germany that developed before World War II. The second wave took place in previously-colonised newly-independent countries, such as in India in 1950, and in parts of Africa by the mid-1960s, ostensibly to prevent new indigenous governments from continuing the abusive practices of colonialism. The third is said to have occurred in countries undergoing transition from a quasi-democratic or authoritarian regime to a democracy and, in some countries, a market economy, such as occurred in post-communist Central and Eastern Europe (Ginsburg, 2003, p. 90; Autheman, 2004, pp. 5–6; Hirschl, 2004b, pp. 7–8).

11 However, Ginsberg and Versteeg (2013) have since found no evidence to support this 'diffusion thesis', except as between democratic regimes.

still in power (Ginsburg, 2003, pp. 18, 25, 248). They do this hoping that the judiciary will, when exercising constitutional review, 'protect the substantive values that the drafters will be unable to vindicate through the political process' (Ginsburg and Versteeg, 2014, p. 588).[12]

Hirschl (2004a, p. 89), while accepting that Ginsburg compellingly explains constitution-making during periods of transition, argues that Ginsburg's account cannot explain why judicial review has been introduced in countries *not* undergoing transition. He also maintains that Ginsburg's view of politics as an electoral struggle is simplistic, ignoring the complex matrix of religion, culture and politics (Hirschl, 2004a, p. 89). Instead, Hirschl (2004a, p. 11) explains the emergence of judicial review as 'self-interested hegemonic preservation'. He argues that, faced with waning popular support, dominant political elites seek to lock-in their policy preferences while they still hold parliamentary majorities, to guard against the future actions of increasingly influential opposition groups and interests. This elites do by instituting favourable legal – preferably constitutional – change, and then handing power to the judiciary to enforce it through judicial review. Later in this Chapter, I consider whether Ginsburg and Hirschl persuasively account for the introduction of constitutional review in Indonesia.

2 The Need for a Constitutional Court

As mentioned at the outset, many commentators point to the Wahid saga as the primary impetus for the Constitutional Court's establishment. The founding Chief Justice, Jimly Asshiddiqie (2004), has himself claimed that the Court would not have been established but for the crisis.

Yet the nexus between the Wahid saga and the Constitutional Court's establishment is arguably not as direct as traditionally presumed. Indeed, the Court might well have been created without it. The idea had been circulating in opposition circles for decades in Indonesia, and well before the Wahid saga had played out, several Indonesian parliamentarians had visited various countries in the Northern Hemisphere to obtain ideas about constitutional reform. They had returned with proposals to create a constitutional court, which were already being debated by an MPR Working Committee in 2000 (Hendrianto, 2009, p. 158).

On a narrow view, the Wahid saga cannot even account for the Court being granted all of its functions. It explains only the Court's power to hear

12 See also Ramseyer, 1994, p. 722; Ginsburg, 2003, pp. 18, 25, 248; Stephenson, 2003, pp. 61, 84.

impeachment motions – a jurisdiction the Court has, incidentally, not exercised.[13] A broader view portrays the Wahid saga as drawing attention to the urgent need for an impartial high-level body to resolve disputes between state institutions using 'legal rules, rather than politics' (Asshiddiqie, 2004, p. 11). This broader view is consistent with functionalist accounts, mentioned above, that explain the emergence of judicial review as necessary to ensure that the 'rules of the political game' are followed, particularly in states where power is constitutionally divided (Shapiro, 1988, 1993). Most of the amendments made during the first and second rounds (1999–2000) did in fact divide up political power and lawmaking authority that had, under the original 1945 Constitution and in state practice, been concentrated in the hands of the president. In particular, the national legislature's lawmaking authority was increased and the president's reduced (Butt and Lindsey 2012, especially Chapters 2 and 3). However, the Wahid saga was certainly not the only contentious matter of state that had troubled the newly-elected post-Soeharto government. As Meitzner (2010, p. 410) puts it, 'Key socio-political forces quarrelled over unclear laws and regulations, triggering conflicts that threatened to derail the democratisation process'. Quite apart from the Wahid saga, then, it had becoming increasingly clear to those drafting amendments to the Constitution that Indonesia needed an impartial dispute-resolution body to help define and then enforce the myriad new 'rules of the game'.

The functionalist explanation, then, appears at least partially to account for the Court being established with power to resolve jurisdictional disputes between state institutions whose jurisdictions are constitutionally delineated (although, as discussed in Chapter 1, it has rarely been called upon to exercise that power). It is also consistent with authority being given to the Court to perform constitutional review, the main object of which is to ensure that the legislature keeps within its jurisdiction – that is, within constitutional bounds – when enacting statutes. Finally, it also appears to explain the grant of power to adjudicate electoral disputes. Article 22E of the Constitution, which deals

13 Harding and Leyland (2009, p. 326, n 41) argue that the Wahid saga is 'perhaps a good example of Ginsburg's "insurance" theory in operation'. Hendrianto (2009, p. 162) provides a different view, pointing out that two months after Wahid's impeachment, the PDI-P formally proposed the establishment of the Constitutional Court with jurisdiction to decide impeachment motions, apparently motivated by President Megawati and her party fearing that what had happened to Wahid could also happen to her unless an impartial adjudicator were established to preside over such motions. Hendrianto (2009, p. 162) argues that these circumstances turn Ginsburg's theory on its head: rather than a constitutional court being established as insurance against electoral loss, in this case it was to protect a president who had already taken power.

with elections, was inserted during the third round of amendments in 2001. Article 22E(2) states that the DPR, DPD and DPRD, and the president and vice-president, are to be elected. Article 22E(1) requires that these elections take place every five years and be organised in a 'direct, public, free, secret, honest, and fair way'. Ensuring that elections are free and fair, and resolving disputes about the results, are important aspects of maintaining the democratic 'rules of the game'.

However, the functionalist explanation has its shortcomings. In particular, it fails to explain why the Court was not granted power to resolve other types of jurisdictional disputes that drafters anticipated when they fixed the Court's jurisdiction.[14] Some of these appear to be as important, if not more important, than the disputes the Court was granted power to resolve. For example, when exercising constitutional review, the Court is limited to reviewing the constitutionality of statutes, not lower-level laws, such as government and ministerial regulations and decisions, the numbers of which far exceed national legislation by many several fold, as discussed in Chapter 3. The Court also lacks jurisdiction to review the constitutionality of the many thousands of bylaws issued by regional governments, even though reviewing them is critically necessary for preserving legal order in the post-authoritarian state (Butt, 2010). Likewise, the Constitutional Court has no power to resolve jurisdictional disputes between state institutions not mentioned in the Constitution; yet some of these institutions arguably play more important roles than those whose jurisdictions *are* outlined in the Constitution.

Another early priority for drafters was providing human rights guarantees for citizens. Under Soeharto's military regime, serious state-sanctioned human rights violations had been committed to stifle resistance and dissent. These ranged from suppressing democratic and political freedoms; violent clashes during demonstrations; kidnapping, torturing and murdering activists; and military operations in parts of Indonesia where sectarian conflict took place, such as East Timor and West Papua (Lubis, 1993).

By 2000, the drafters had already inserted a Bill of Rights into the Constitution. This is a large catalogue of rights, drawn from the main international human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Social and

14 As discussed below and in the following Chapter, these 'shortcomings' appears to have been the result of compromises made as constitutional amendments were deliberated in the MPR.

Economic Rights (ICSER), both of which Indonesia has ratified.[15] With remarkably little debate,[16] the Constitutional Court was later granted jurisdiction to ensure that the national legislature complied with the Constitution, including this Bill of Rights.

3 International Influences

Drafters also appeared to be inspired by the prevalence abroad of constitutional courts with judicial review jurisdiction. As mentioned, some MPR Committee members went on study tours to European countries with constitutional courts and returned to Indonesia convinced of the need for such a court (Mahkamah Konstitusi, 2010b, pp. 511, 531). Others argued that Indonesia should follow neighbouring countries in East and Southeast Asia, such as South Korea and Thailand, which had recently established democratic constitutions supported by systems of judicial review (Mahkamah Konstitusi, 2010b, pp. 495, 526).[17] Some drafters wanted to establish 'internationally legitimate' institutions and were said to have accepted that judicial review was part of the 'standard kit' for new democracies (Horowitz, 2013, pp. 28, 241). By 1998, Indonesia stood out as one of few countries without constitutional review.[18]

15 Indonesia ratified the ICCPR by Law 12 of 2005 and the ICSER by Law 11 of 2005. In 1999, the Indonesian national parliament had already issued two statutes concerning human rights: the 1999 Human Rights Law, which sets out various human rights standards, many of which are also included in the Bill of Rights; and 2000 Human Rights Courts Law, which defines and criminalises gross violations of human rights and crimes against humanity, establishes human rights courts as a branch of Indonesia's general court system, and allows the national parliament to establish an ad hoc tribunal to hear human rights abuses allegedly perpetrated before the 2000 Human Rights Court Law came into force. See generally Clarke (2003) and Herbert (2008).

16 According to Hendrianto (2009, pp. 165–166) 'the issue of individual rights never featured during the debate on the formation of the Constitutional Court' and 'there was no extensive discussion on how those rights could be defended in the Constitutional Court'.

17 Harding (2001, p. 237) refers to this phenomenon as the 'New Asian Constitutionalism'.

18 In 1998, only the United Kingdom, the Netherlands, Lesotho, Liberia and Libya had not introduced a system of constitutional review (Autheman, 2004, p. 2). The 1999 Human Rights Law gave the Supreme Court power to invalidate government regulations for breach of its human rights protections. However, this mechanism provided limited protection. I am not aware of the Supreme Court invalidating a regulation for breach of statutory human right provisions.

4 Historical and Political Factors

It would be a mistake to view the establishment of an independent judicial body to police the 'rules of the game' or enforce human rights protections against the state as a new or foreign concept for Indonesia. Whether the country should have formal human rights protections and an independent judiciary with powers of judicial review had long been subjects of debate there. But these debates did not lead to the introduction of judicial review for various political and historical reasons. In particular, from 1959, presidents Soekarno and Soeharto established powerful ideological and structural barriers that discredited the idea. Indeed, judicial independence was progressively degraded, so that even if judicial review had been introduced, it would not have operated effectively, if at all.

4.1 *Constitutional Debates*

Well before Indonesia declared its independence on 17 August 1945, prominent Indonesian political leaders were discussing whether, once independent, Indonesia should adopt a liberal democratic political system, incorporating constitutional review. Muhammad Yamin was a prominent member of the Investigating Committee for the Preparation of Independence (*Badan Penyelidikan Usaha Persiapan Kemerdekaan*) where this and other matters were considered. He advocated the establishment of a body with power to examine whether statutes violated the Constitution or even customary and Islamic law (Asshiddiqie, 2008, p. 3), or at least that the Supreme Court should perform this function, following the United States model (Lev, 1978, p. 57). Professor Soepomo, perhaps then Indonesia's most respected jurist, opposed Yamin's proposal. He observed that Indonesia had no experience with judicial review, arguing that 'before using this system surely we must truly understand it' (Asshiddiqie, 2008, p. 3).

Ultimately, judicial review was not adopted in 1945 when Indonesia proclaimed its first Constitution as an independent state. But it was not categorically or expressly rejected. Some argue that whether Indonesia should adopt constitutional review was never definitively settled because the Committee never completed the debates.[19] Others emphasised that Soepomo's objection was not to judicial review itself but rather to the timing of its introduction.[20]

19 Asshiddiqie (2008, p. 3) cites Prof Laica Marzuki as describing the debates as 'inconclusive' but provides no source.

20 The late former Supreme Court, Judge Paulus Efendi Lotolung, made this comment when appearing before the MPR Working Group Committee in 2000 (Mahkamah Konstitusi, 2010b, p. 445).

After all, the 1945 Constitution was only intended to be temporary, to be replaced with a 'more complete and more perfect' (Yamin, 1971, p. 410) constitution once independence had been consolidated.[21]

Whether Indonesia should introduce judicial review was revisited from November 1956, when the Indonesian *Konstituante*, or Constituent Assembly, was established to debate and draft a permanent constitution. Again, some Assembly members advocated that the Supreme Court or a new constitutional court be given power to review whether statutes, regulations or government acts violated the constitution (Nasution, 1992, pp. 233–234). However, the *Konstituante* was disbanded before the matter could be voted upon, when, in July 1959, Soekarno reinstated the 1945 Constitution (Asshiddiqie, 2008, p. 3). Arguably, then, whether Indonesia should have judicial review was never fully resolved, at least as a matter of constitutional debate, until provision was made for the Constitutional Court's establishment in the third amendment to the Constitution, approved on 9 November 2001.

4.2 *Judicial Subjugation*

The political systems that developed from 1959 under President Soekarno and from 1966 under President Soeharto did not formally provide for judicial independence, let alone judicial review. Under his Guided Democracy (*Demokrasi Terpimpin*) (1959–1965), Soekarno began subjugating the judiciary. Soekarno publicly discredited the judiciary for 'holding back' post-colonial Indonesia, complaining that lawyers were hesitant, reactionary, legal-book minded and unreflective towards the ideas of modern Indonesia (Lev, 1972, p. 261). He also rebuked the judiciary for continuing to apply Dutch laws, principles and procedures, thereby effectively perpetuating colonial rule in the independent state (Lindsey, 1996, p. 57). (This criticism was hardly fair. Judges did not continue to use Dutch law by choice. The Constitution itself provided that Dutch laws and legal institutions remained until the newly-independent government replaced them (Article II, Transitional Provisions of the Constitution; Government Regulation 2 of 1945). The blame for the application of Dutch laws lay with Soekarno's government itself, which was slow to issue new statutes and regulations to replace them, even after the 'revolution' ended with the withdrawal of the Dutch in 1949.)

Soekarno's response was 'revolutionary law' (*hukum revolusi*), which he justified as necessary for building a strong independent state, unencumbered

21 Indeed, a Western-style liberal democratic Constitution was issued in 1949 but was soon replaced with the Provisional Constitution of 1950 (Gandasubrata, 1996, p. 48).

by legal restrictions (Lev, 1972, p. 261). Lindsey (1996, p. 57) explains the concept:

> Any law not in accordance with the radical leftist revolutionary principles [Soekarno] saw as the essence of the independent Indonesian State would be invalid…The President, as the ultimate determinant of what was "revolutionary" became the arbiter of justice and legal authority. The rule of law eroded as Dutch laws were declared inconsistent with the spirit of independent Indonesia and presidential policy began to replace law.

This 'revolutionary law' concept culminated in the enactment of the 1964 Judicial Power Law. The statute explicitly rejected the *Trias Politika* (separation of powers); categorised the courts as an instrument of the national revolution; and enabled the President to interfere in, or retrospectively alter, the decision of any Indonesian court for the sake of the ongoing revolution or national interests.[22]

Further, Soeharto's 'New Order' (1966–1998) moved from subjugation to active co-option of the judiciary. This was achieved primarily through government control over judicial administration. The Ministry of Justice controlled the organisational, administrative and financial affairs of the general and administrative courts; the Religious Affairs Ministry controlled those of the religious courts; and the Defence and Security Department those of the military courts (Gandasubrata, 1997, p. 17). Judiciaries the world over rely on governments for their funding and, particularly in some civil law countries, for their administration. Under Soeharto, however, this control was regularly wielded to leverage decisions favourable to the government (Supreme Court of Indonesia, 2003; Pompe, 2005).[23] The employment, pay, promotion and postings of judges were made largely contingent upon compliance with the will of the state (Lev, 1978, pp. 55–56; Asia Watch, 1988, p. 169).[24] The result was that the New Order government could dictate decisions and lost very few cases.

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22 Article 19 of the Law stated: 'We are in the stage of revolution and struggle for the realisation of a just, prosperous society, so all progressive forces, including organisations and state apparatuses are merely revolutionary tools…The *trias politika* is, therefore, not in conformity with the national law of Indonesia'.

23 Although the government often denied that it used its advantage over the judiciary in this way. Lev (1978, p. 54) explains that, in the view of former Justice Minister Seno-Adji, 'the judiciary was no less in need of control than the executive' but that 'a rigid concept of separation of powers was less productive than one of institutional cooperation'.

24 The incentives to toe the line were strong. Indonesia is a strikingly diverse country, with major cities, particularly those in Java, boasting modern facilities for the middle to upper classes. There is, therefore, a tendency for judges to be reluctant to be posted outside of Java. Many other parts of Indonesia, such as Sumatra, Sulawesi, Kalimantan and Eastern

4.3 *Ideological Competitors*

Besides these structural controls, Soeharto's New Order used powerful ideological tools to justify repressing the attempts of state institutions (including courts) and civil society to check its power. These tools were also used to support the government's refusal to provide citizens with basic internationally-recognised human rights (Lubis, 1993). While these tools have been discussed elsewhere,[25] they deserve brief mention here given their use to resist introducing constitutional review.

Primary amongst them was the 'integralistic state' concept. Introduced by Professor Soepomo when addressing the Investigating Committee for the Preparation of Independence in May 1945, this concept views citizens and the state as an 'organic unity' (Yamin, 1959, p. 111). Citing Nazi Germany and Imperial Japan as examples where the state and its people were 'unified', Soepomo argued that integralism was inherently suitable as a basis for the new Indonesian state because it was already being practised indigenously, particularly in villages. Drawing on his reputation for expertise in Indonesian customary law, Supomo argued that Indonesian traditional communities emphasised 'the unity of life, the unity between servant and master…and between the people and their leadership' (Nasution, 2011, pp. 14–15).

The integralistic state was an authoritarian one, requiring a strong president to lead it. And, because the people and their leaders were indistinguishable, providing redress against the state – such as with human rights or judicial review – was unnecessary: no conflict between state and citizen was anticipated. Supomo recognised that under this model the people would need 'unreserved trust' in the state, particularly its leader; but, for him, this was acceptable because the state would simply not abuse its power (Nasution, 2011, p. 15).

The integralistic state concept was opposed in Committee debates (Lubis, 1993, p. 93) and does not appear in any of Indonesia's constitutions, including the 1945 Constitution. Rather, the 1945 Constitution categorised Indonesia as a 'law state' (*Rechtsstaat*).[26] Nevertheless, the executive-heavy Constitution,

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Indonesia, for example, are, for most judges, less coveted. Additionally, there are so-called hardship posts riddled with social and religious unrest such as Aceh and Papua (KHRN and LeIP, 1999).

25 See generally Lev, 1978; Lubis, 1993; Bourchier, 1999; Burns, 2004; Butt and Lindsey, 2012.

26 This statement was initially included in the general Elucidation to the Constitution. During the Constitutional amendment process in 1999–2002, the Elucidation was removed. The reference to *Rechsstaat* was replaced with a statement, in Article 1(3), that Indonesia is a *negara hukum* (literally, law state).

much of which Soepomo drafted, reflected integralist principles, as did state practice.

The primary vehicle through which the New Order government maintained integralism, particularly from the early 1980s, was Indonesia's national ideology, *Pancasila*, contained in the Preamble to the 1945 Constitution (Simanjuntak 1994). *Pancasila* (literally 'The Five Principles') embodies a commitment to the following principles:

1. *Ketuhanan Yang Maha Esa* (Belief in Unitary Deity);
2. *Kemanusiaan Yang Adil dan Beradab* (A Just and Civilised Humanity);
3. *Persatuan Indonesia* (The Unity of Indonesia);
4. *Demokrasi*; and
5. *Keadilan Sosial* (Social Justice).[27]

Pancasila was initially conceived as an ideology of inclusion, devised in the lead-up to the declaration of Independence as a way to bring together the archipelago's diverse cultures and religious beliefs under a single banner. By contrast, the Soeharto regime used *Pancasila* to support government action and to discredit alternatives raised by critics. The New Order government indoctrinated students at all levels with the philosophy and required it to be the philosophical basis of all social and political organisations (Morfit, 1981). *Pancasila*'s principles are vague, and the New Order government controlled their precise interpretation and hence what type of action violated them (Lubis, 1993, p. 8). The regime could and did, therefore, declare groups or even strains of thought to be anti-*Pancasila*, usually without further explanation. Being anti-*Pancasila* was synonymous with subversion, and those brave enough to 'push back' against the government often faced prison or threats of, or actual, physical violence at the hands of the military (Southwood and Flanagan, 1983). Soon enough, government officials used this integralistic interpretation of *Pancasila* to justify government interference in judicial processes and reject calls for judicial review (Lubis, 1993).

By these structural and ideological mechanisms, constitutional review – along with the associated concepts of judicial independence, the rule of law (*negara hukum*), constitutionalism, democracy and human rights – was ideologically suppressed during Soeharto's reign. But arguments for its introduction were not extinguished. They flourished amongst legal reformist and opposition figures, most notably in Indonesia's Legal Aid Office, whose

27 *Pancasila* is formally recognised as the 'source of all sources of law' (Article 2 of 2011 Lawmaking Law).

lawyers provided not only legal representation to the poor but also 'structural legal aid', bravely speaking out against perceived state violations of the rule of law, and calling for judicial reform, including judicial independence and review (Crouch, 2011b; Butt and Lindsey, 2012). This they often did in the face of regular threats (Nasution, 2011, p. 9). Even some judges and private lawyers pushed for judicial independence and judicial review at various times, including when key judiciary-related statutes were aired in parliament (Lev, 1978).

4.4 *Structural Reforms and the Fading of* Pancasila

The Soeharto regime had also sought to justify its repressive nature by emphasising the importance of political stability (*stabilitas*) to development (*pembangunan*), both economic and social (Van Langenberg, 1986). For most of Soeharto's time in power, economic growth was, in fact, impressive (Hill and Narjoko, 2010). However, the Asian economic crisis that began from 1997 unravelled much of the economic development achieved under Soeharto, with Indonesia suffering one of the world's biggest economic and monetary crises in the post-World War II era (Levinson, 1998). Many Indonesians were unable to afford basic necessities and unrest spread across the archipelago.

As the economy weakened, so too did the justifications for authoritarianism and the credibility of the New Order's ideological arsenal developed to support it. It quickly became accepted that the New Order had 'betrayed' the true values of *Pancasila*, rendering the ideology mere political rhetoric used to promote conformity, stifle dissent, limit human rights and, ultimately, to legitimise the regime (Butt and Lindsey, 2012). The MPR even decreed an end to indoctrination of *Pancasila* in schools and universities – something that would have been unthinkable under Soeharto – after resolving that the ideology was 'no longer consistent with developments'.[28] *Pancasila*, and its integralistic interpretation, almost disappeared from political discourse and even seemed on the verge of irrelevance (Cribb, 2010).

Of course, one reaction to the perceived abuses of the Soeharto regime was statutory and constitutional reform, which subsequently moved Indonesia towards a liberal democratic system that embraced the separation of powers. Critically, distributing state power amongst several entities – particularly to democratically-elected national parliaments, to elected regional governments and legislatures and to the judiciary – dismantled the centrepiece of the integralistic state: political power concentrated in the hands of the President

28 MPR Decree XVIII/MPR/1998, which revoked MPR Decree II/MPR/1978 on the Guide to Living and the Practice of Pancasila.

(Waddell, 2005, p. 52). These democratic and institutional reforms, and the decline of ideological competitors that had helped prop up the Soeharto regime, created an ideologically unencumbered climate in which the arguments in favour of judicial review, and the establishment of a constitutional court, could gain prominence. In particular, the consistent and sustained arguments that lawyers and reformists had made for greater judicial independence and constitutional review since Indonesia's independence could finally be considered openly – and they were, both in the newly-free media and amongst drafters of the constitutional amendments. Non-government organisations – comprising the *Konstitusi Baru* (New Constitution) civil society movement – pushed these reforms strongly.[29] And crucially, the parliament, elected in 1999, was largely receptive to them, for reasons to which I now turn.

4.5 *Constitutional Reform as a Political Survival Tactic*

Horowitz observes that Indonesia's transition to constitutional democracy was fairly unique because reform took place *after* elections. In many other countries, elections have marked the *end* of transition rather than its beginning.[30] In Indonesia, 'democratisation' preceded 'renovation'[31] because of the political, economic and social circumstances that emerged after Soeharto's fall. His successor, Bacharuddin Jusuf Habibie, had come to power constitutionally[32] and on the back of 1997 elections in which Golkar, Soeharto's electoral vehicle, had obtained 75% of the vote – its most dominant victory.[33] However, Habibie's closeness to Soeharto left him with questionable political credibility. He was

29 These included PSHK (*Pusat Studi Hukum dan Kebijaksanaan Indonesia* – Centre for Indonesian Law and Policy Studies), LeIP (*Lembaga Kajian dan Advokasi untuk Independensi Peradilan* – Indonesian Institute for an Independent Judiciary), KRHN (*Konsorsium Reformasi Hukum Nasional* – National Legal Reform Consortium), LBH (*Lembaga Bantuan Hukum* – Legal Aid Institute), YLBHI (*Yayasan Lembaga Bantuan Hukum Indonesia* – the Indonesian Legal Aid Foundation) and PBHI (*Perhimpunan Bantuan Hukum Indonesia* – Indonesian Legal Aid and Human Rights Association).

30 Although, as Horowitz (2013, p. 2) notes, there are exceptions, such as Hungary, Poland and Spain.

31 See Horowitz (2013), Chapter 2, entitled 'Democratisation before renovation'.

32 As mentioned, Article 8 of the 1945 Constitution provided that if the President died, resigned or became unable to perform his or her duties, then he or she was to be succeeded by the Vice President until the end of the presidential term. For discussion of criticisms of Habibie's legitimacy and convincing counterarguments, see Indrayana (2008: 107).

33 Golkar had won between 62.11% and 74.51% of the vote in the elections held between 1977 and 1997: Indonesian Electoral Commission's website: http://www.kpu.go.id/Sejarah/pemilu1977.shtml.

said to be 'disliked personally and disdained politically by nearly every important group in Indonesian society, including significant elements of his own Golkar party' (Liddle, 2002, p. 387). Recognising this, Habibie brought forward to 1999 national elections due for 2002.

For most of Soeharto's rule, Indonesia's electoral systems were strongly tilted in Golkar's favour.[34] Some observers feared that the 1999 elections might maintain this bias, given that a Golkar-heavy parliament was to enact the statutes governing the conduct of those elections. However, the instability of the post-Soeharto period lingered and Habibie was said to fear that further demonstrations and rioting could ensue unless statutes established free and fair elections (Horowitz, 2013, p. 336). Beyond the expectations of many, the statutes ultimately enacted 'opened up' the 1999 elections, which were heralded as the most free and fair since the mid-1950s.[35] Forty-eight parties contested them, and an independent electoral commission was established to oversee them – the *Komisi Pemilihan Umum* or KPU.

Because of this process, the constitutional reform that ensued was primarily driven and negotiated by freely and fairly elected legislators, who made up the majority of the MPR – the body with authority to amend the Constitution.[36] Around two-thirds of the newly-elected parliamentarians were not associated with the Soeharto regime (Indrayana, 2008, p. 114). Some were noted reformists and former opposition leaders who had pushed for democracy and human rights protections during the Soeharto era, often at great personal risk. Many had a strong and genuine desire to 'defeat authoritarianism' (Horowitz, 2013, pp. 53, 87–88).

Approximately one-quarter of the parliament had served in the previous New Order regime, including as members of Golkar. Nevertheless, those who

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34 For example, in the early 1970s, Soeharto fused several political parties into two 'opposition' parties – the United Development Party (*Partai Persatuan Pembangunan*) and the Indonesian Democratic Party (*Partai Demokrasi Indonesia*). The inevitable internal divisions driven by the differing ideologies and priorities of these parties made it difficult for them to check the exercise of government power, let alone present themselves as a viable alternative government. Worse, the Soeharto regime sought to manipulate the voting at party congresses to ensure the election of a chairperson favourable to the regime.

35 The 1999 Political Parties Law; 1999 General Elections Law; and 1999 Representative Institutions Law.

36 At that time, the MPR comprised 500 DPR members, of whom 462 were elected and 38 were army and police appointees, and 200 non-DPR members, 135 of which were regional representatives appointed by provincial parliaments, with 65 from 'functional groups' (which included religious leaders, academics, women's groups and others) (Indrayana, 2008, p. 115).

might not have otherwise supported democratic reforms found themselves carried along in a 'genuinely competitive environment' alongside the elected newcomers (Horowitz, 2013, pp. 1, 50). In this environment, they could not resist calls for democratic reform, at least openly. Rather, they needed to be seen to support them to keep any power and influence (Crouch, 2010, pp. 7–9). As Horowitz put it, '[n]o Indonesian politician could have neglected the prospect of massive violence or even civil war' (Horowitz, 2013, p. 34). There was a real fear that – with secessionist threats and religious tensions mounting, rioting in major cities and continuing threats of further violence in the streets – Indonesia might disintegrate unless key reforms were achieved. As Crouch (2010, p. 7) explains:

> The crisis was so severe that most of the surviving members of the new order elite were persuaded that in order to save themselves they would have to accept substantial reforms, even when such reforms harmed the immediate interests of that elite itself.

For this reason, the 'insurance' and 'hegemonic self-preservation' accounts of Hirschl and Ginsburg appear to be of limited utility in explaining the emergence of judicial review in Indonesia. As mentioned, their theses hold that traditional political elites are likely to introduce judicial review to protect their interests if they anticipate regime change. However, at the time of transition, Indonesia's Soeharto-era carry-overs were probably unable to pursue self-interest. The only interest they could reasonably have expected to achieve by supporting the introduction of a constitutional court – along with the many other reforms – was to maintain their power, in the face of threats of unrest and disintegration if they failed to pursue genuine reform. There is little evidence to suggest that the Soeharto-era elite could have co-opted a majority of newly-elected parliament to help them preserve their interests.[37]

37 For a convincing critique of the accounts of Hirschl and Ginsburg along these lines in the context of Columbia, see García-Herreros (2012), who shows that Columbian political and economic elites did not control the Constituent Assembly when it amended the Constitution to introduce judicial review (García-Herreros, 2012, pp. 240–41). Indeed, García-Herreros (2012, p. 237) argues that in post-transition Columbia, constitutionalism was 'counter-hegemonic', because the constitutionalism of rights and the establishment of a constitutional court were 'instrumental in preserving a space in Colombian politics for progressive political agendas that [were] clearly rejected by traditional elites'.

5 Debates about Form and Jurisdiction

Early in the constitutional amendment process it was decided that amendments would be made by consensus rather than by the constitutionally-permitted two-thirds of MPR members (Horowitz, 2013, pp. 87, 94). Presumably this was intended to give the amendments greater legitimacy,[38] but the decision made amendment particularly difficult given the numerous cleavages within Indonesian society – primarily religious and ethnic – that had been given parliamentary representation after the 1999 elections. All political parties represented in the DPR were represented in the MPR Committee established to draft the amendments (Horowitz, 2013, p. 12). This multi-polarity also made achieving consensus slow (Horowitz, 2013, p. 6), with most proposed amendments settled by 'informal, interpersonal negotiation rather than by open debate, let alone balloting' (Horowitz, 2013, p. 74).

However, the need to build consensus also brought significant advantages. Horowitz (2013, pp. 6–7) argues that, perhaps counter-intuitively, conflict was reduced because all parties needed to compromise to accomplish their own agendas. As Crouch (2010, pp. 332–333) puts it:

> The fragmentation of political forces…meant that no powerful and organised reform movement emerged to fight for a common reform agenda. Instead the supporters of reform consisted of disparate groups [each of which] had their own expectations of what reform would bring. The inability of any group to establish its leadership of the reform movement…facilitated broad acceptance of the democratic framework that would permit the representation of all major groups – including those who had worked to overthrow the Suharto regime as well is those who had defended it.

As mentioned, broad consensus emerged within the MPR Working Group debating the 2000 and 2001 constitutional amendments that an institution was needed to settle important disputes in the new constitutional order. However,

38 After all, the 1945 Constitution carried significant ideological weight. It was Indonesia's first Constitution and marked the declaration of its independence from the Dutch. Also, Soeharto's New Order had heavily promoted it, eventually giving it the weight of a semi-sacred text. Although the New Order's ideological apparatus suffered enormous reputation damage in the lead-up to and after Soeharto's fall, public veneration for the 1945 Constitution may well have endured. Amendments to it needed, therefore, to be strongly supported and decisive.

there was less agreement about which institution should perform this function and the powers it should receive. Members of the Working Group considered three institutional alternatives. The first was a court that formed part of the MPR. The second was the existing Supreme Court, perhaps in a constitutional chamber. The third was a new Constitutional Court.

The MPR alternative appears to have been discarded early in the deliberation process – at least before the 2000 amendment debates concluded. Proponents, such as Zainal Arifin from the PDI-P faction, argued that a constitutional court's function was political and involved lawmaking. It should not, therefore, be part of the judiciary if the separation of powers was to be maintained (Mahkamah Konstitusi, 2010b, p. 476). However, for other members, having the MPR perform this function was undesirable. It met only rarely, so its capacity to perform such reviews was limited (Mahkamah Konstitusi, 2010b, p. 461). Indeed, the MPR had already given itself the power to review and invalidate laws,[39] but had not exercised it (Asshiddiqie, 2008, p. 5). Further, the MPR could not be expected to independently check the exercise of legislative power because most of its members were also members of the DPR. The MPR would, therefore, likely be called upon to review legislation that most of its own members had enacted, albeit as members of the DPR.

Whether a constitutional court should form part of the Supreme Court was still being debated in 2001. Initially, PDI-P and Golkar – the two parties garnering the most votes in the 1999 elections – favoured this option. By Hendrianto's account (2009, pp. 159–161), PDI-P expected that its leader, Megawati Soekarnoputri, would soon become president and wanted to avoid expanding judicial power, afraid that this might reduce presidential authority. Golkar and the military were said to fear that a new court might hold them accountable for past wrongs. They favoured the Supreme Court because of its previous general subordination to government.

Only smaller parties wanted a new court (Hendrianto, 2009, pp. 159–161). In this, they were supported by an Expert Team recruited by the MPR to help it deliberate unresolved matters. Various members of this Team expressed concern that giving the Supreme Court jurisdiction over constitutional matters was not a viable 'reformist' option (Mahkamah Konstitusi, 2010b, pp. 461, 548). As mentioned, the Supreme Court had, during the Soeharto years, become renowned for dependence on government, and confidence in its capacity and integrity was low (Pompe, 2005). Furthermore, very little evidence suggested that, if given the power, the Supreme Court would actively exercise it. Since the 1970s, the Supreme Court had held jurisdiction to review lower-level laws, such

39 See MPR Decree III/MPR/2000.

as government regulations and presidential decisions, to determine whether they were consistent with a higher form of law, such as a statute.[40] The Supreme Court often refused to hear such cases, usually citing technicalities. According to Bambang Widjojanto (2004, p. 40), for example, 26 cases were lodged with the Supreme Court between 1992 and 1999. However, of these, only five were decided; 20 were not decided, and one was struck out.[41]

One member of the Expert Team was University of Indonesia Constitutional Law Professor Jimly Asshiddiqie, who, as mentioned, was later to serve as the Constitutional Court's founding Chief Justice. Quite apart from concerns about professionalism, he emphasised the need to establish the Constitutional Court as an institution separate from and independent of the Supreme Court (Mahkamah Konstitusi, 2010b, p. 495). With great prescience he pointed out that, given the Supreme Court was an institution established by the Constitution, it might become involved in constitutional disputes.[42] It would hardly be appropriate for the Supreme Court to decide disputes about itself.[43]

By the end of the 2001 debates, Golkar and PDI-P delegates had agreed to the Constitutional Court being established as a separate institution (Mahkamah Konstitusi, 2010b, pp. 520–525). However, this agreement appeared to be part of a compromise under which the scope of the Court's jurisdiction was to be limited, at least in light of the alternatives raised during the debates.

About the Court's constitutional review jurisdiction, for example, there was significant diversity of opinion. Some Working Group members argued that the Court's constitutional review jurisdiction should extend beyond statutes to other types of laws.[44] This would allow the Court to examine whether legal instruments (such as regulations, decrees and decisions) issued by the national executive (including ministries and the president's office) and local

40 MPRS Decree III/MPR/1978 concerning the Position and Working Relationship between the Highest State Institution and Superior State Institutions, Article 11; 1970 Judicial Power Law, Article 26(1); 1985 Supreme Court Law, Article 31(3).

41 Though in the early 1960s, Indonesian judges were encouraged to review old Dutch statutes and Codes still in force in Indonesia (Lev, 1965, p. 299).

42 Assiddique's concern was borne out within only a few years, when the Constitutional Court heard a case brought by the Supreme Court against the Judicial Commission. This case is discussed in Chapter 4.

43 Though, as we shall see in Chapter 4, the Constitutional Court has showed little reluctance to review the constitutionality of statutes that regulate its own functioning and to invalidate them if necessary.

44 Harjono endorsed this view and Palguna of the PDI-P opposed it (Mahkamah Konstitusi, 2010b, pp. 553, 514). Both Harjono and Palguna served as Constitutional Court judges during 2004–2008.

governments complied with the Constitution. This option appears to have been close to endorsement, appearing in a draft of Article 24A of the Constitution produced in October 2001 (Mahkamah Konstitusi, 2010b, p. 561). Others urged that the Constitutional Court should be able to review specific instruments, such as statutes and local government laws, as against both the Constitution and higher-level laws (Mahkamah Konstitusi, 2010b, pp. 491–492). By contrast, the Expert Team, and some MPR Working Group members,[45] had recommended that these powers be much broader, encompassing the review of *all* types of laws for compliance with both the Constitution and higher-level laws. This was tantamount to the Constitutional Court assuming an expanded version of the Supreme Court's jurisdiction to review lower-level laws as against statutes and the Constitution. This view was advocated by Asshiddiqie, who argued that the Court's primary role would, therefore, be to 'ensure legal order' (*menjamin tertib hukum*) (Asshiddiqie, 2008, p. 38; Mahkamah Konstitusi, 2010b, p. 507).

Ultimately, the Court was given a narrow review jurisdiction: to test statutes enacted by the national parliament against the Constitution (Mahkamah Konstitusi, 2010b, p. 559). This was justified by reference to South Korea, which divided power between its Supreme and Constitutional courts in the same way (Asshiddiqie, 2008, p. 45). Taking government regulation and action beyond the purview of the Court appeared to satisfy the PDI-P and Golkar concerns mentioned earlier. However, as discussed in Chapter 4, confining the Court's review powers in this way left large bodies of law unreviewable against the Constitution by any judicial institution.

The Court's jurisdiction to resolve disputes between state institutions was also discussed in the MPR Working Group debates, albeit relatively briefly. There was significant support, including from the PDI-P and Golkar, for the Court to be granted specific jurisdiction to resolve disputes between any state institutions, including between central and regional governments and between regional governments themselves (Mahkamah Konstitusi, 2010b, pp. 496, 514, 537). Many members also appeared ready to allow the Constitutional Court to resolve inconsistencies between national statutes (Mahkamah Konstitusi, 2010b, pp. 462, 514, 559). Eventually, the Court was given a relatively restricted function considering the alternatives: resolving jurisdictional disputes between state institutions established in the Constitution. After all, as argued by Hamdan Zoelva, a proponent of this restriction who later became the Constitutional Court's fourth Chief Justice, because the main function of the Constitutional Court was to guard the Constitution, the Court should only

45 For example, Sutijpto from Golkar (Mahkamah Konstitusi, 2010b, p. 551).

hear disputes between institutions established by the Constitution (Mahkamah Konstitusi, 2010b, p. 473). Disputes between other institutions could and should, he argued, be settled by the Supreme Court (Mahkamah Konstitusi, 2010b, p. 474).[46]

The Court's remaining powers drew less controversy and diversity of opinion. Most, if not all, factions agreed that the Court be given power to resolve electoral disputes and to dissolve political parties (Mahkamah Konstitusi, 2010b, p. 511), though some experts warned that electoral disputes could become the Court's core business (Mahkamah Konstitusi, 2010b, pp. 505–506). Ultimately, the Court's jurisdiction to decide electoral disputes was cast relatively broadly – to 'resolve disputes about the results of general elections'. Likewise, by 2000 most factions had agreed that, if the MPR sought to impeach a president, the Constitutional Court should play a role by providing a legal opinion or decision about the impeachment motion. However, there was debate about whether that decision should be merely advisory and hence ignorable, or a prerequisite to impeachment (Mahkamah Konstitusi, 2010b, pp. 541–545). In the event, the precise status of the Court's opinion in impeachment motions was left open-ended, merely requiring that it 'provide a decision'.

6 Conclusion

After Soeharto fell in 1998, the political power previously concentrated in his hands was dispersed amongst various state institutions, both national and subnational. It soon became clear that Indonesia needed a new institution to resolve 'high-level' disputes between these newly-established or empowered institutions involving important matters of state, and to enforce Indonesia's new constitutional framework. Although the Wahid saga undoubtedly brought this into sharp relief, the need was already recognised and might have been fulfilled in any event.

However, because the MPR was politically fragmented when the Court's form and jurisdiction were debated, compromise was needed to reach consensus. One result of this appears to be that the Court was not entrusted with enforcing as many 'rules of the game' in Indonesia's new democracy as it might

46 As for resolving disputes between the central and regional government, Zain Badjeber (of PPP) appeared to take a more integralistic view, questioning whether this function was necessary in a unitary state, in which local governments could not really 'conflict with their central government' (Mahkamah Konstitusi, 2010b, pp. 473–74).

have otherwise been, with many types of important 'high-level' disputes falling outside its remit. Resolving some of these matters was left to pre-existing institutions, such as the Supreme Court. Other types of matters were simply left non-justiciable. As we shall see in subsequent Chapters of this book, these inadequacies and gaps have carried serious consequences for the quality of Indonesia's constitutional democracy.

CHAPTER 3

The Structure of the Court

Judges, Access, Decision-Making and Enforcement

In this chapter, I discuss key aspects of the Court's 'institutional design' and decision-making practices. These aspects significantly influence the 'strength' of the judicial review the Court performs (see Ginsburg, 2003), discussed in later chapters of this book.

First, I consider the constitutional and statutory framework that governs the Constitutional Court's composition and how its judges are appointed and dismissed. The mechanisms contained therein have largely ensured the Court's independence of government.

Second, I discuss access to the Court – that is, who can bring constitutional review applications and the interests they can seek to protect. The statutory rules and the Court's own jurisprudence on standing allow generally broad access to the Court for most Indonesian individuals and entities. The Court has, in practice, permitted applicants to seek protection for a wide range of constitutional rights and interests – even if the applicant has not suffered actual loss or 'constitutional damage', as the Court calls it. The Court has also reviewed statutes despite declaring that the applicant lacked standing, on the apparent basis of 'public interest'.

Third, I analyse the Court's decision-making practices, including how it structures decisions, the legal and secondary sources upon which it draws, its use of dissenting judgments, and the extent to which its decisions are binding. As we shall see, some of these practices changed markedly when the Court's second Chief Justice, Mahfud, came into office.

Finally, I turn to the enforcement of Constitutional Court decisions. The Court has no formal enforcement powers. However, after early indications to the contrary, the government now appears to comply with the Court's decisions as a matter of course.

1 Judicial Appointment

During the constitutional debates leading up to the third amendment in 2001, almost all factions represented in the MPR agreed that the Constitutional Court should have nine judges, and that the three arms of government – the DPR, President and Supreme Court – should appoint three each (Mahkamah Konstitusi,

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2010b, p. 498). This mechanism was ultimately adopted in Article 24C(3) of the Constitution[1] – though why the MPR decided that each nominating institution should choose three judges, rather than a different number, was not explained (Mahkamah Konstitusi, 2010b, pp. 533–534).[2] If a position on the bench becomes vacant, such as through retirement or dismissal, the institution that nominated the outgoing judge fills the vacancy (Article 26 of the 2003 Constitutional Court Law).

Constitutional Court judges serve a maximum of two five-year terms.[3] They elect their own Chief and Deputy Chief Justices, who hold their positions for two years and six months.[4]

1.1 *Prerequisites*

Article 24C(5) of the Constitution requires judges to have high levels of integrity; to be of impeccable character, fair and just; to have comprehensive

1 The mechanism is also restated in Article 18 of the 2003 Constitutional Court Law and Article 34(2) of 2009 Judicial Power Law.

2 Some members referred to the practices of other states such as Korea, Germany and other European countries (Mahkamah Konstitusi, 2010b, p. 535, p. 537). Some opponents argued, apparently with little support, that judges should be appointed by the MPR from a list of candidates proposed by the Supreme Court (Mahkamah Konstitusi, 2010b, pp. 535–556). Former Justice Minister Patrialis Akbar, who later served on the Court himself, argued that Constitutional Court judges should be appointed using same process for Supreme Court judges (Mahkamah Konstitusi, 2010b, p. 562).

3 Article 22 of the 2003 Constitutional Court Law.

4 Article 4(3) of the 2003 Constitutional Court Law. In the *MK Law Amendment case No 2* (2011), the Court invalidated the following provisions of the 2011 Amendments to the 2003 Constitutional Court Law: Articles 4(f) (which required that the Chief Justice and Deputy Chief Justice be elected at a single meeting), 4(g) (the judge obtaining the most votes becomes the Chief Justice), and 4(h) (the judge obtaining the second-highest number of votes becomes the Deputy Chief Justice). For the Court, these provisions could impede the functioning of the Court, thereby potentially damaging the constitutional rights of citizens. This was because if all nine judges voted during the meeting to elect the Chief Justice and Deputy, then one judge would always get more votes than any other, but more than one judge might obtain the second-largest number of votes. For the Court, if this occurred, the entire vote would be nullified and would need repeating. This would be necessary to avoid a deadlock over the Deputy Chief Justice position, even though the prospective Chief Justice had already obtained a majority. This might, in turn, affect the legitimacy of the elected chief justice (*MK Law Amendment case No 2*, 2011, p. 67). There seems very little to commend this decision, however. In particular, nothing in the words of the impugned provisions would appear to prevent the Court from holding an immediate run-off election between the two Deputy Chief Justices who receive the same number of votes.

understanding of constitutional and administrative law; and not to hold government office while serving on the Court. These constitutional requirements are restated, and other prerequisites imposed, in Articles 15–19 of the 2003 Constitutional Court Law. Since these provisions were originally enacted in 2003, the Constitutional Court Law has been amended twice – first, by the 2011 Amendments to the 2003 Constitutional Court Law; and second, by the 2013 Interim Emergency Law, which was endorsed by the DPR in 2014.[5] As we shall see, the Constitutional Court has invalidated various provisions of the 2011 Amendments and the entire 2013 Interim Emergency Law.

Originally, Article 16 of the 2003 Constitutional Court Law required only that Constitutional Court judges have Indonesian citizenship, a law degree and at least ten years of legal experience; be at least 40 years old; and not have been convicted of a crime carrying a sentence of five years or more or declared bankrupt. The 2011 Amendments removed Article 16 and imported these requirements into Article 15, with some changes and additions. Candidates must now also have a doctorate 'based on a higher degree in law' and at least 15 years' legal experience; be committed to Almighty God, honourable and between 47 and 65 years of age; and never have been convicted of any criminal offence.[6] They must also provide various documents, including curriculum vitae, copies of degrees, wealth reports and tax file numbers. Constitutional Court judges are prohibited from working as a state official in another capacity, as a businessperson, as an advocate or a public servant, and from being a member of a political party while serving on the bench (Article 17 of the 2003 Constitutional Court Law).

The 2013 Interim Emergency Law replaced Article 15 but restated precisely the same requirements bar one: that the candidate has not been a member of a political party within seven years of being nominated as a Constitutional

5 Through Law 4 of 2014. Article 22 of the Constitution requires that the DPR endorse emergency laws at its next sitting to remain in force. For further discussion, see Chapter 6.

6 Articles 15(2d) and 15(2h) of the 2011 Amendments were reviewed in the *MK Law Amendment case No 2* (2011). The Court upheld the challenge to Article 15(2h), which had initially required that Constitutional Court judges 'have at least 15 years' work experience in the field of law and/or have been a state official'. For the Court, this provision was unclear, thereby breaching the constitutional right to legal certainty, because it could be interpreted 'cumulatively' or 'alternatively'. That is, it could require candidates to have 15 years' legal experience *and* 15 years of working a state official, or to have *either* 15 years' legal experience *or* 15 years of working as a state official. The Court's solution was to remove 'and/or have been a state official' from Article 15(2h). Article 15(2d) imposes the 47–65 years old restrictions. The Court rejected the applicants' challenge to Article 15(2d), holding that the government had power to regulate such matters without breaching the Constitution.

Court judge (Article 15(2)(i)).[7] (As we shall see in Chapter 4, the President had issued this Emergency Law in response to the arrest of the then-serving Chief Justice, Akil Mochtar, for receiving bribes to fix the outcomes of regional head election disputes over which he was presiding. He had formerly been an active member of the Golkar political party, and those from whom he was suspected of taking bribes were also members of that party.) However, within only a few months, the Constitutional Court had, in the *MK Perpu case* (2014), invalidated these Emergency Law amendments. It appears, therefore, that members of political parties can become Constitutional Court judges, provided that they relinquish their membership before taking up a position on the Court.

1.2 *Nomination*

Article 20(1) of the 2003 Constitutional Court Law states that each of the three nominating institutions are to devise their own procedures for selecting, choosing and nominating Constitutional Court judges. However, vague conditions are imposed on the nomination process. Article 19 of the 2003 Constitutional Court Law requires that nomination be 'transparent and participatory'.[8] The Elucidation to Article 19 requires that proposed candidates be announced in the print and electronic mass media so that the community can comment on them.[9] Article 20(3) of the 2003 Constitutional Court Law requires that judges be chosen in a way that is objective and accountable.[10]

With some exceptions, the parliament, president and Supreme Court have appointed judges using closed internal mechanisms, in apparent contravention of these rules. This has caused controversy about the process the nominating institutions have used to select their judges. For example, when the Court was initially constituted in 2003, only the DPR established a formal process to determine its appointments. Each DPR faction proposed three candidates and a DPR Commission then screened them. The names were then released to the public for comment.[11] Several days later, 'fit and proper' tests were conducted, and then a plenary session approved the judges after a faction-head meeting to choose the frontrunners. However, neither the President nor the Supreme

7 The 2013 Interim Emergency Law also required candidates to provide a declaration indicating that they were not members of a political party (Article 15(3)(f)).

8 This is restated in Article 34(2) the 2009 Judicial Power Law.

9 The elucidation is the Explanatory Memorandum that accompanies many types of Indonesian laws.

10 This is restated in Article 34(3) of the 2009 Judicial Power Law.

11 The DPR set up a website to obtain community input about candidates (Hukumonline, 2003a).

Court employed such processes, or explained how their candidates fulfilled the constitutional and statutory requirements for appointment. Concerns were therefore raised about the selection process becoming politicised. According to *Hukumonline* (2003b):

> the question arises, whether the constitutional court judges are experts that can perform the tasks of constitutional judges… Or, do they only represent the political forces in those three proposing institutions?

The fear was that, despite constitutional and legislative provision for the Constitutional Court's independence,[12] its judges would side with their nominating institutions in cases involving those institutions. Even if no bias in fact existed, perceptions of partiality might emerge, tainting the Court's credibility.

However, very little, if any, evidence of co-option has emerged. I have, for example, found no pattern of dissents in which a particular judge has promoted a view favourable to his or her nominator.[13] The independence of judges from their nominating institutions has not been seriously questioned by legal commentators or the press. Indeed, some have argued that the Constitutional Court is a model for other courts, demonstrating how to handle cases free from outside influences (Syamsuddin, 2004, p. 168).

Though the representative system is undoubtedly fallible, its apparent success in Indonesia appears to support Ginsburg's predictions, based on observations of the system's use in other countries, that it can nevertheless lead to independent appointments. He observes that the three arms of government do not usually appoint judges overtly sympathetic to their own interests (Ginsburg, 2003, p. 45). If they did, then

> the other appointing bodies will respond by appointing their loyal partisans. Because only one-third of the membership is appointed by any one body, each can be assured that it will be unable to dictate outcomes if each judge acts as a pure agent… Each body that appoints a person who appears to be a pure agent signals that it may plan to engage in extra-constitutional action and needs to influence the court to uphold its

12 See, for example, Article 24(1) of the Constitution, which requires that the Constitutional Court be independent in 'upholding the law and justice'.

13 After all, judges do not decide cases as individuals but rather as a 'bench'. Even if three judges pursued the interests of their nominating institutions in their decisions, they are likely to be outvoted by the remaining six judges on the bench.

> action. By appointing someone who appears "neutral" and nonpartisan, the appointing authority signals that it does not anticipate needing or using the court to uphold its own controversial actions. Thus, representative mechanisms may provide…an incentive for moderate appointments.
>
> GINSBURG, 2003, p. 45

1.2.1 The 2013 Interim Emergency Law

Nevertheless, another threat to the Court's independence has emerged: the lure of corruption. Allegations of impropriety surrounded the resignation of Aryad Sanusi in February 2011 and in late 2013 Akil Mochtar was removed from the Court for taking bribes.

The 2013 Interim Emergency Law was issued by President Susilo Bambang Yudhoyono in response to Akil Mochtar's arrest in October 2013. This Law sought to change how Constitutional Court judges were appointed, presumably to prevent a repeat of the incident.[14] The Emergency Law required that candidates undergo a 'fit and proper' test, conducted by an Expert Panel, before being inaugurated by the President. The process was as follows. First, the Supreme Court, DPR and President submitted their proposed candidates to the Panel. They could each propose up to three times the number of candidates required to fill their quota of vacancies on the Court. Second, the Panel subjected these candidates to a 'fit and proper test' and then provided the nominating institutions with names of candidates who had 'passed'. Ideally, the Panel provided the nominating institutions with the number of candidates needed to fill the vacancies on the Court, plus one. However, if the Panel only 'passed' as many candidates as there were vacancies, then the nominating institution could simply put forward those candidates for presidential inauguration or it could submit more candidates to the Panel for testing. If not enough candidates 'passed' to fill the vacancies, then the nominating institutions submitted more candidates to the Panel for examination.

The 2013 Emergency Interim Law stipulated that the Expert Panel was to be established by the Judicial Commission, and to begin performing its functions within three months of establishment. The Panel was to have seven members – one proposed by each nominating institution and four by the Judicial Commission (comprising a former Constitutional Court judge, a community figure, a legal academic and a legal practitioner).[15]

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14 The 2013 Interim Emergency Law sought to impose these changes by inserting Articles 18A, 18B and 18C into the 2003 Constitutional Court Law.

15 The 2013 Emergency Interim Law established prerequisites for Panel members, including that they have an unblemished reputation, track record, credibility, integrity and

However, in the *MK Perpu case* (2014), the Constitutional Court invalidated the entire 2013 Emergency Interim Law. For the Court, the involvement of the Judicial Commission in nominating and monitoring judges compromised the Court's independence, which was guaranteed by the Constitution. At time of writing, then, the three nominating institutions could still choose candidates without external scrutiny, let alone veto. However, as we shall see, they must still employ some transparency and objectivity in their selections.

1.2.2 Patrialis Akbar

Perhaps the most controversial individual appointment to the Constitutional Court has been Patrialis Akbar, selected by the president in 2013. Critics claimed that Akbar, a former Minister for Justice, had performed poorly while holding office, particularly in human rights matters, and questioned his independence (Aritonang, 2013; Parlina, 2013).

Two civil society organisations were particularly vocal in their criticisms – the Indonesian Legal Aid Institute (*Yayasan Lembaga Bantuan Hukum Indonesia* (YLBHI)) and Indonesia Corruption Watch (ICW). They challenged the validity of the Presidential Decision by which Susilo Bambang Yudhoyono had appointed Patrialis Akbar, and had reappointed Justice Maria Indrati to a second term.[16] They brought this challenge in the Jakarta Administrative Court.[17] They argued that the Presidential Decision contradicted Articles 19 and 20(3) of the 2003 Constitutional Court Law, which, as mentioned, required that nomination be 'transparent and participatory' and the choice of judge 'objective and accountable'.[18]

A three-judge panel heard the case at first instance. A two-judge majority decided that, while both Maria Farida Indrati and Patrialis Akbar met the formal prerequisites for judicial office, the process by which they were nominated did not comply with Article 19. The majority observed that the DPR, Supreme Court and President had developed different processes to choose their appointments, as they were entitled to do. However, these processes needed to be 'transparent and participative' and the nomination 'objective and accountable'. The majority pointed out that, while the President had directly appointed judges to the Constitutional Court for 2003–2008, he had employed transparent and participatory processes to appoint judges in 2008. He had established

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sufficient expertise; and have not been a member of a political party in the previous five years.

16 Presidential Decision 87/P of 2013.

17 Jakarta Administrative Court Decision 139/G/2013/PTUN-JKT.

18 Jakarta Administrative Court Decision 139/G/2013/PTUN-JKT, p. 141.

a judicial selection committee chaired by respected lawyer Adnan Buyung Nasution and comprising many legal experts. They had performed 'fit and proper' tests of candidates, eventually selecting three judges, including Justice Indrati. However, in 2013, the President had not used these processes to reappoint Justice Indrati and appoint Justice Akbar, but had simply issued the Presidential Decision. For the majority, this was not transparent and participatory. The Court ordered the President to revoke the Presidential Decision that appointed Justices Patrialis and Indrati.[19]

Patrialis Akbar appealed to the Jakarta High Administrative Court. He claimed, not without merit, that failure to appeal would 'endanger the Court'. If the first instance Administrative Court decision stood, the Constitutional Court would have only six judges. (At this time, Akil Mochtar had been dismissed but not replaced.) Under Article 28(1) of the 2001 Constitutional Court Law, the Court could not decide cases with less than seven judges.

His appeal succeeded on a technicality. The Jakarta High Administrative Court accepted Akbar's argument that the civil society organisations that brought the case against him had lacked standing to bring the application. While, as legal entities, they were not precluded from bringing applications before administrative courts, they had an insufficient interest in challenging the Presidential Decision to appoint Akbar (Hukumonline, 2014h). Despite extensive searching, I have been unable to obtain the appeal judgment, making it impossible to analyse the decision. Presumably, however, the Administrative Court found that the Presidential Decision was directed towards Justices Akbar and Indrati, not the applicants, so they could not claim to have been affected by the Decision. The applicants have since appealed to the Supreme Court. It is likely, however, that both Indrati and Akbar will serve full terms before that appeal is decided.

2 Dismissal of Judges

The Constitutional Court Law distinguishes between 'honourable' discharge (*pemberhentian dengan hormat*) and 'dishonourable' dismissal (*pemberhentian dengan tidak hormat*) of judges (Article 23 of the 2011 Amendments to the 2003 Constitutional Court Law). The grounds for honourable discharge are

19 Justice Elizabeth Tobing issued a dissenting opinion. She held that failure to publicise the nominations in the mass media did not constitute maladministration and did not, of itself, render the Presidential Decision invalid. She also emphasised the need to ensure legal certainty in the Constitutional Court.

voluntary resignation, death, turning 70 years of age, expiration of one's term, and being unable to perform one's judicial functions for three consecutive months because of physical or mental illness (Article 23(1)).

The main reason for dishonourable dismissal is judicial misconduct. Article 23(2) of the 2011 Amendments sets out an exhaustive list of grounds, including the following.

Being Convicted of a Crime for Which Imprisonment is a Punishment. This ground does not appear to require that the judge be sentenced to a term of imprisonment, but rather merely be convicted of a crime for which a term of imprisonment, regardless of duration, *could* have been imposed. This means that a Constitutional Court judge could be dismissed for committing a relatively minor offence, though this has not yet happened.

Breaching the Ethics Code for Constitutional Court Judges. Article 27A(1) of the 2011 Amendments requires the Constitutional Court to draft an 'Ethics Code and Constitutional Court Judge Behaviour Guidelines'. These must be followed by its judges when performing their functions, to guard their integrity and their 'irreproachable, just and statesperson-like character'. The Court had already produced an Ethics Code for its judges in 2003, making further revisions in 2005 and 2006.[20] The Ethics Code largely reflects the Bangalore Principles of Judicial Conduct 2002, incorporating the principles of independence, impartiality, integrity, propriety, equality, competence, diligence and wisdom. The Code defines each principle and outlines their importance, before describing how Constitutional Court judges should apply them in practice.

The 2013 Interim Emergency Law had sought to require the Constitutional Court to draft and issue this Ethics Code together with the Judicial Commission (Article 27A(1)) and any other 'competent' parties (Article 27A(2)). As mentioned, the Constitutional Court invalidated the Emergency Law in the *MK Perpu case* (2014). The result, it seems, is that the Constitutional Court remains solely responsible for its own Ethics Code.

Incidentally, Article 23(2) includes as grounds for dismissal 'a reprehensible act' and 'breach of the oath of office', both of which are also prohibited under the Ethics Code the Court has devised. The oath, contained in Article 21 of the 2003 Constitutional Court Law, requires judges, *inter alia*, to pledge in the

20 Constitutional Court Regulation 2/PMK/2003 on the Ethics Code and Constitutional Court Judge Behaviour Guidelines; Constitutional Court Regulation 7/PMK/2005 on Applying the Ethics Code and Constitutional Court Judge Behaviour Guidelines; Constitutional Court Regulation 9/PMK/2006 on Applying the Ethics Code and Constitutional Court Judge Behaviour Guidelines.

name of God to fulfil their obligations as best and as justly as possible, uphold the 1945 Constitution, follow all laws as closely as possible, and be devoted to the nation. Presumably, breach of these pledges will also constitute grounds for dismissal.

Neglect of Duties. Articles 23(2)(c) and (e) allow judges to be removed for failing to perform their tasks and obligations five consecutive times without providing a valid reason.

Other Reasons. These include the judge breaching the prohibition on working in another profession – such as a lawyer, businessperson, state official or political party member – while holding judicial office.[21] Another reason is the judge no longer fulfilling the requirements of office. This might occur if the judge takes on foreign citizenship or is declared bankrupt, both of which would have precluded him or her from initially taking office (under Article 15 of the Constitutional Court Law, mentioned above). Yet another is the judge deliberately impeding the Constitutional Court when it is deciding an impeachment motion.[22]

2.1 *Dismissal Process*

The President is responsible for formally dismissing Constitutional Court judges, by issuing a Presidential Decision (Article 23(4)). However, Article 23(3) of the 2003 Constitutional Court Law requires that judges be given the opportunity to defend themselves at a hearing of the Constitutional Court Honour Council (*Majelis Kehormatan Mahkamah Konstitusi*) before being dismissed.

2.1.1 Honour Council

Importantly, the 2003 Constitutional Court Law grants power to the Court itself to regulate the 'establishment, composition and procedures' of that Council (Article 23(5)). However, since that Law's enactment in 2003, the DPR and President have both attempted to change the composition of the Council and determine who choses its members, and to permit the Council to issue sanctions against judges it finds have breached the Ethics Code.

The 2011 Amendments gave the Constitutional Court power to establish the Council, but required that it comprise one Constitutional Court judge, one member of the Judicial Commission, one person from the DPR, one government official working in the field of law and one Supreme Court judge

21 Prohibited in Article 17 of the 2003 Constitutional Court Law.

22 Under Article 7B(4) of the Constitution, the Court must 'provide a decision' about this within 90 days of being requested by the DPR if the DPR seeks to impeach the president or vice president.

(Article 27A(2)). They permitted the Council to issue written reprimands, suspensions and even dismissals (Article 27A(5)), and, like the original 2003 Constitutional Court Law, authorised the Constitutional Court itself to issue further regulations about the Council's composition, organisation and procedures (Article 27A(7)).

By contrast, the 2013 Emergency Law required the establishment of a permanent Constitutional Court Judge Honour Council (*Majelis Kehormatan Hakim Konstitusi*), made up of one former Constitutional Court judge, one legal practitioner, one legal academic and one community figure. While the Judicial Commission was not represented on the Council itself, the Emergency Law required that the Constitutional Court, *together with the Judicial Commission*, regulate how Council members were chosen, its organisational structure, and its procedures (Article 27A(13)).

However, as mentioned, the Constitutional Court has since struck down Article 27A(2) of the 2011 Amendments and the entire 2013 Emergency Law. The Court invalidated Article 27A(2) on grounds that involving the DPR, government and Supreme Court in investigating and dismissing Constitutional Court judges threatened the Court's independence required by Article 24(1) of the Constitution, because these institutions could appear before the Constitutional Court as parties (*MK Law Amendment case No 2*, 2011, p. 72).[23] As for the Judicial Commission representative, the Court pointed to its decision in the *Supreme Court v Judicial Commission case* (2006), discussed in Chapter 4, where it held that the Commission lacked jurisdiction to supervise the Constitutional Court, also for reasons of judicial independence. Similarly, in the *MK Perpu case* (2014), the Court found the 2013 Emergency Law requirement that it cooperate with the Judicial Commission to regulate the Council had compromised its independence. The original 2003 provisions, contained in Articles 23(3)–(5) of the 2003 Constitutional Court Law, therefore, continue to govern how Constitutional Court judges are monitored and, if necessary, disciplined. The process remains largely internal. Even though the Court can, and does, call in outsiders to help adjudicate allegations of misconduct by its judges, the Court chooses them and regulates how the Council operates.

At time of writing, Constitutional Court Regulation 2 of 2014 on the Constitutional Court Honour Council governed the Council's composition and procedures. The Court issued this Regulation about one month after deciding

23 The Court also found Articles 27A(3), (4), (5) and (6) – which deal with the powers, procedures and sanctions of the Council – invalid because they were closely interrelated with Article 27A(2).

the *MK Perpu case* (2014). It authorised the Chief Justice to convene the Honour Council after receiving a written complaint about a judge from the Court's Ethics Council.

Article 5 of the Regulation requires that five people sit on the Honour Council: one serving and one former Constitutional Court judge, one law professor, one community figure, and one member of the Judicial Commission. They are chosen during a closed plenary meeting of Constitutional Court judges, except for the member of the Judicial Commission, who is chosen by the Judicial Commission on the Constitutional Court's request (Article 6). The rationale for the Court including a member of the Judicial Commission on the Council is unclear, given the ferocity with which the Court has defended its independence from the Commission in the cases just mentioned. Presumably the Court's main concern in these cases is to ensure its exclusive regulatory control over the Honour Council: if a Judicial Commission member serves on it, this is because the Court has permitted it, not because some other body requires it.

2.1.2 Ethics Council

The Ethics Council, on the other hand, is a permanent body comprising three members: a former Constitutional Court judge, a law professor, and a community figure (Article 15 of the Regulation).[24] While the Ethics Council can call judges to account for their actions, summon witnesses, and issue verbal warnings to judges, its main function is receiving complaints about suspected 'breaches' by Constitutional Court judges and then deciding whether to propose that the Chief Justice establish an Honour Council to further investigate them (Article 22 of the Regulation). Echoing Article 27B of the 2011 Amendments, which remain in force at time of writing, these breaches include 'reprehensible acts', failing to attend court to perform their tasks five consecutive times without a valid reason, violating the judicial oath or Ethics Code, receiving a bribe, and expressing an opinion or making a statement outside court about a case that the Court is handling but has not yet decided. Also included as a breach is failing to perform one's obligations as a Constitutional Court judge: that is, failing to follow procedural law, treat parties with justice and impartiality, and issue objective decisions based on the facts and the law (Article 21(2) of the Regulation).

24 The Ethics Council itself is chosen by a three-member Selection Committee comprising a former Constitutional Court judge, an academic and a community figure (Article 20(3) of the Regulation).

2.2 *Arsyad Sanusi*

In the first decade of the Constitutional Court's existence, two of its judges have been called before the Honour Council, one of them twice. The first case involved Justice Arsyad Sanusi. He faced allegations that his daughter and son-in-law had accepted bribes in 2008 from Dirwan Mahmud, a losing candidate in a regional head election who sought to dispute the result before the Court.[25]

The complaint against Justice Sanusi was brought in late October 2010 by Refly Harun, a former employee of the Court and legal academic, who represented the respondent in that electoral dispute (Jakarta Post, 2010). Chief Justice Mahfud asked Harun to establish a team to prove these allegations. The team, which included well-respected lawyers Adnan Buyung Nasution, Bambang Widjojanto and Saldi Isra, found that Justice Sanusi's daughter had, in return for a bribe, arranged a meeting between Dirwan Mahmud and Makhfud, an official of the Constitutional Court and former Chairperson of the Surabaya High Court (Jakarta Post, 2010). (When questioned by then-Chief Justice Mahfud, Makhfud admitted to receiving Rp 58 million in bribes and a land certificate, but claimed to have returned both after the Constitutional Court ruled against Mahmud (Jakarta Post, 2010).) However, the team found no evidence that Justice Sanusi knew about the bribe, let alone received anything.

Nevertheless, the Honour Council decided that Justice Sanusi had breached the Ethics Code by allowing members of his family to deal with parties involved in cases before the Court and recommended that he be formally reprimanded (Hukumonline, 2011c). Justice Sanusi eventually submitted a resignation letter to the Chief Justice in February 2011, citing the need to preserve the Court's reputation. Ultimately, however, he left office when he reached the mandatory retirement age (Jakarta Post, 2010).

2.3 *Akil Mochtar*

The other Constitutional Court judge to face the Honour Council was Chief Justice Akil Mochtar. In early February 2011, Mochtar faced allegations that he had received Rp 1 billion to help a candidate win a dispute over the 2010 North Sumatra regional head election results. The Council decided that he had neither been involved in bribery nor breached the Ethics Code (Hukumonline, 2011c).

However, after the Anti-corruption Commission (*Komisi Pemberantasan Korupsi*, or KPK) caught him 'red-handed' in October 2013 receiving a bribe to fix another electoral dispute and he was implicated in several other corruption

25 This dispute is discussed in Chapter 10.

investigations, the Honour Council quickly convened to dismiss him. Chaired by Justice Harjono and with former Chief Justice Mahfud and former Judicial Commission Deputy Chairperson Abbas Said as members, the Council found that Akil Mochtar had breached several provisions of the Ethics Code, uncovering a range of 'misconduct' that had not previously been publicly or widely discussed.[26]

Some breaches were relatively minor, such as travelling overseas with his family without informing the Court's Secretariat General, and failing to register his Toyota Crown Athlete car. Nevertheless, the Council decided that these breached the Code's integrity principle and Article 23(b) of the 2011 Amendments, which prohibits judges from performing 'reprehensible acts'.

Other breaches were more serious, including:

- Naming his chauffeur as the owner of his Mercedes Benz S-350 to avoid paying tax. The Council found this 'inappropriate' and to have 'undermined the authority' of the Court.
- Meeting a member of the DPR in his office. This breached the Code's principles of 'independence' and 'integrity to maintain the image and authority of the Court'.
- Distributing an unusually high number of regional head election disputes to himself rather than other judges. For the Council, this violated the 'integrity' and 'impartiality' principles: chief justices usually handled far fewer of these cases than other judges because of their additional 'structural and administrative' duties.
- Ordering his secretary and chauffeur to make cash payments and bank transfers into his account, including a transaction from the legal representative of a party involved in a case before the Court. For the Council, this demonstrated lack of 'integrity'.
- Formally postponing the implementation of a Constitutional Court decision, thereby delaying a regent's inauguration, without first consulting with other judges. Again, this contravened 'integrity' and 'impartiality'.[27]

The Honour Council also noted that the National Narcotics Board had found four marijuana cigarettes, one of which had been used, and two ecstasy pills, in Mochtar's office. The Board matched his DNA with the DNA on the used

26 The following description is based on Hukumonline (2014e). I have been unable to obtain the proceedings and decisions of the Constitutional Court Honour Council, which are not generally available to the public.

27 By issuing Letter 1760/AP.00.03/07/2013, 26 July 2013.

cigarette. For the Council, possession of these substances breached the principle of 'integrity'.

At first glance there seemed little utility in the Council convening to pursue relatively minor allegations of impropriety. After all, they paled in comparison with the alleged crimes for which the KPK was investigating him. Indeed, the Council emphasised that its proceedings, and the sanction it imposed, was unconnected to those criminal proceedings.[28] Mochtar himself refused to appear before the Council, declaring that the Council had no jurisdiction over him because he had already resigned. As his lawyer, Otto Hasibuan, explained after the Council's decision was handed down, the decision was 'non-executable' and had 'no effect whatsoever' on Mochtar (Hukumonline, 2014e).

However, the Honour Council's intervention was essential to maintaining the future credibility and, ultimately, viability of the Court. Commencing within a few weeks of Mochtar's arrest, the Council's proceedings were an important public relations exercise, designed primarily to demonstrate that the Court itself had workable accountability mechanisms to ensure the integrity of its judges. Had the Court stood by while the KPK pursued Mochtar alone, its reputation would probably have plummeted further.

3 Access to the Constitutional Court

The Indonesian Constitutional Court has, from its earliest days, generally allowed a wide range of applicants to seek to protect an equally wide range of rights and interests before it. While concerned to make the Court readily accessible to applicants, founding Chief Justice Jimly Asshiddiqie also wanted it to hear many cases quickly so that it could establish and develop its own constitutional jurisprudence (Hendrianto, 2009, p. 170).[29] The Court also allows a

28 The Council lacks criminal jurisdiction and could, therefore, not rule on the alleged bribery for which the KPK was investigating Mochtar.

29 The Court's concern to allow open access stands in stark contrast to initial drafts of the 2003 Constitutional Court Law deliberated in the national parliament in which access was strictly circumscribed. In one such draft, the national Ombudsman functioned as a 'gatekeeper'. Only through it could individuals bring constitutional applications. Presumably the intent behind these provisions was to prevent the Court being flooded with frivolous cases (DPR, 2003, p. 16). These initially-proposed standing restrictions appear to reflect practices of some European Constitutional Courts, which hear only cases brought by particular state institutions or government officials (Ginsburg and Versteeg, 2014, p. 591).

broad range of 'related parties' (*pihak terkait*) to make submissions in cases that touch upon their interests.[30]

The rules on standing, contained in Article 51(1) of the 2003 Constitutional Court Law, comprise two interrelated limbs, both of which applicants must satisfy to have the Court hear their applications on the 'merits'. First, applicants must convince the Court that they fall within the categories of individuals or groups entitled to bring a constitutional review application. Second, they must demonstrate that the statutory provisions to which they object damage at least one of their constitutional rights. I turn now to discuss both limbs.

3.1 *Standing: Who Can Bring an Application Before the Court?*

As for the first limb, Article 51(1) grants access to:

a. an individual Indonesian citizen;
b. a customary law community, provided that it still 'lives' and accords with community developments and the principles of the Unitary State of the Republic of Indonesia as regulated by statute;
c. public legal or private entities; or
d. state institutions.

Only rarely has the Court denied standing to applicants for failing to satisfy this first limb. Most of the applicants bringing cases discussed in this book, for example, have been individual citizens, state institutions or political parties. All of these fall within Article 51(1). As we shall see, when the Court denies standing, it usually does so because the applicant has suffered no constitutional damage.

The Court tends to grant standing to civil society organisations (CSOs) or non-government organisations (NGOs) and other associations, provided that their 'charters' or articles of association have some connection to the substance of the application (*Migas Law case*, 2003, p. 200). Various organisations whose purposes are to promote the rule of law, human rights, the public interest or democracy, are granted standing almost as a matter of course, even if they are not directly affected by the statue under review. Granting standing to these organisations is critically important to ensure access to the Court, particularly for the disadvantaged, whom these organisations often represent.

30 For example, the National Human Rights Commission for Women, *Komnas Perempuan*, made submissions to support positive discrimination in the *Open List case* (2008) and the KPU often appears in constitutional reviews of electoral laws that touch upon its role.

3.1.1 Foreign Citizens

The Court has denied standing to foreign citizens. An example is the *Death Penalty case* (2007), a challenge brought by three Australian and two Indonesian applicants sentenced to death by firing squad for drug offences. They argued before the Constitutional Court that the provisions of the 1997 Narcotics Law under which they had been sentenced to death violated constitutional provisions that guaranteed the 'right to life' (*hak untuk hidup*).[31] A preliminary issue was whether the Australians had standing.

A six-judge-to-three majority decided that they did not, construing Article 51(1) as being exhaustive. Because the only reference to individuals in Article 51(1) was to 'Indonesian citizens', foreign individuals were excluded. (Incidentally, this finding did not prevent the case proceeding because the Court granted standing to the two Indonesian applicants (*Death Penalty case*, 2007, pp. 367–369). The Court ultimately upheld the constitutionality of the death penalty.[32])

The three dissenting judges[33] held that Article 28A of the Constitution, which provides the right to life, specifically gives it to 'every person' (*setiap orang*) and therefore applies to foreigners and citizens alike (*Death Penalty case*, 2007, pp. 434–451). Article 51(1) therefore violated the Constitution to the extent that it excluded foreigners from bringing constitutional challenges. Justices Marzuki and Siahaan also pointed to the constitutional rights to equal treatment and recognition before the law. They held that those rights also applied to citizens and non-citizens. Foreigners must therefore have access to the Court to pursue their constitutional rights, as do Indonesian citizens (*Death Penalty case*, 2007, pp. 434–471).[34]

A question that remains open is whether the Court might grant standing to a foreign organisation, such as a corporation or NGO. Such entities might – as Indonesian organisations have done – seek to uphold constitutional provisions that affect them directly or to protect the public

31 Articles 28A and 28I(1) of the Constitution.

32 For a discussion of this case, see Butt and Lindsey (2012, pp. 208–9).

33 Justices Marzuki, Harjono and Siahaan.

34 Justice Siahaan supported this argument by emphasising that Indonesia had ratified the International Covenant on Civil and Political Rights (ICCPR), Article 16 of which requires Indonesia to recognise every person in Indonesia – including non-citizens – as individuals before the law. Indonesia was also obliged to comply with Article 2(1) of the ICCPR, which requires that all parties respect and guarantee to all individuals within their territory and subject to their jurisdiction the rights contained in the ICCPR without discrimination, including on the basis of nationality or citizenship (*Death Penalty case*, 2007, pp. 448–450).

interest, democratic principles and the like. Foreign organisations might also wish to appear alongside Indonesian nationals to help them protect their interests, as have some Indonesian NGOs, described below. They might also attempt to bring an application on behalf of a foreign citizen, if their own specified purposes align with the subject matter of the application.

In favour of granting standing to foreign organisations is the plain wording of Article 51(1). As mentioned, the majority in the *Death Penalty case* (2007) held that the reference in Article 51(1) to 'individual Indonesian citizens' was exhaustive, thereby excluding foreigners. However, Article 51(1) contains no such nationality requirement or restriction for public legal or private entities.

3.2 *Damage to Constitutional Rights*

The second limb of Article 51(1) is that the applicant 'considers that its constitutional rights or powers are damaged by a statute'. By 2005, the Court had formulated a list of requirements that applicants must fulfil to meet this second limb.[35] The applicant must demonstrate:

a. the existence of a right or power provided by the Constitution;
b. that this constitutional right or power is damaged by the statute for which review is sought;
c. that the constitutional damage is specific and actual, or at least potential in the sense that it is reasonably certain to occur;
d. a causal connection between the constitutional damage and the statute for which review is sought;
e. that there is a possibility that, if the constitutional challenge is upheld, the constitutional damage will not occur or will not reoccur.[36]

The Court appears to have formulated these requirements in response to standing-related issues that emerged in early cases. One was whether an applicant could have standing, even absent *actual* constitutional damage, if loss was *anticipated*. The Court's response, in its first case, was that damage need only be potential (*Electricity Law case*, 2003, p. 327). As the Court put it in another early case, it was unnecessary to 'wait for a victim to fall as a result of the Law'

35 See, for example, the *Water Resources Law case* (2005, pp. 476–477); *Bankruptcy Law case No 2* (2005, p. 43–44).

36 The Court now inserts this list into all constitutional review decisions – in the section of its judgment where it assesses whether the applicant has an 'actionable' constitutional right.

(*Broadcasting Law case*, 2003, pp. 75–76). Nevertheless, the Court also emphasised that the applicant must show a 'reasonable chance' of constitutional damage occurring in the future (*Electricity Law case*, 2003, p. 327; *Forestry Law case*, 2005, p. 11). These decisions are largely restated in requirement (c), above.

The Court had contradicted this 'potential' damage rule in several cases. For example, in the *Taxation Court Law case* (2004, p. 42), the Court stated that 'those who can lodge an application are those whose constitutional rights have already been damaged'. Similarly, in the *MA Law case* (2003, pp. 19–20), Judge Roestandi decided that the damage must be 'factual or real damage, not potential or predictive'. However, these inconsistencies were minimised, if not removed altogether, when the Court issued this list of requirements applicants must meet to demonstrate constitutional damage.

Of course, if the statutory provision under review merely reflects the Constitution itself, then there will be no constitutional loss or damage. For example, the Court decided that the applicants in the *Abdurrahman Wahid case* (2004) had suffered no constitutional loss because the impugned provision (Article 6(1) of the 2003 Presidential Election Law), which stated that presidential candidates needed to be physically and mentally healthy, was virtually identical to Article 6 of the Constitution, which also required that presidents be healthy. In the *Ethnic Minorities case* (2012), the applicants sought a review of Article 159(1) of the 2008 Presidential Election Law, which requires that, to be elected, candidates must obtain over 50% of the overall vote and over 20% of the vote in at least half of Indonesia's provinces. The Court held that the applicants suffered no constitutional damage because the text of Article 159(1) is almost identical to the text of Article 6A(3) of the Constitution. Similarly, in early independent candidate cases, discussed in Chapter 9, the Court denied standing to challenge 2003 Presidential Election Law provisions requiring that presidential candidates be nominated by political parties. This was because Article 6A(2) of the Constitution itself required this.[37]

3.2.1 Individual or Broader Interests?

While the Court will not grant standing purely because of the applicants' 'empathy or altruism' (*Christian Party case*, 2009, p. 70), the Court has not usually restricted standing for citizens seeking protection for constitutional rights that are direct or personal to them. Rather, the Court has permitted citizens to seek to protect a wide range of 'public' interests, even if very general. An example is the *Electricity Law case* (2003), where over 20 applicants argued that privatising aspects of the electricity sector – which the government had attempted

37 See *Agus Abdul Djalil case* (2004); *Yislam Alwini case* (2004); *Mulyo Wibisono case* (2004).

by passing the impugned statute, the 2002 Electricity Law – breached Article 33(3) of the Constitution, which requires the state to 'control' important industries. For the Court, the applicants could bring this application because the legislation affected their 'welfare' (*Electricity Law case*, 2003, p. 327).

Similarly, faced with a challenge about the extent to which the state had to control water resources under Article 33(2) of the Constitution, the Court stated:

> Water is extremely vital for human life and the United Nations has even declared the right to water to be a human right so, fundamentally, every person has an interest in legal provisions that can guarantee and protect human rights to water. Therefore, *mutatis mutandis*, every citizen, as a human, has legal standing to question the constitutionality of the Law, which they feel will damage them.
>
> *Water Resources Law case*, 2005, p. 478

In another early case – the *KPK Law case* (2003) – the Court held that citizens had a constitutional interest in state efforts to combat corruption and, therefore, had standing to challenge statutes that could adversely affect those efforts. According to the Court, this interest existed because the state had a constitutional obligation to attempt to combat corruption, partly because the adverse effects of corruption 'endangered the state' (*KPK Law case*, 2003, p. 91).

The Court has also held that individual applicants have a sufficient interest in the processes under which the DPR performs its constitutional functions to challenge statutes that impede their exercise. This is illustrated by the Court's decision in the *DPR Opinion case* (2010), brought both by DPR members and individual citizens. The thrust of their challenge was that the Constitution gave the DPR the right to 'express an opinion' (Article 20A(3)) as part of its legislative, budgetary and supervisory functions (Article 20A(1)). Yet Article 184(4) of the 2009 Representative Institutions Law allowed the DPR to exercise that right only if endorsed by three-quarters of the members of a plenary sitting of the DPR, attended by three-quarters of the members of the DPR. The applicants argued that this threshold was so high that it effectively nullified that right. It was even high relative to both the quorum and support required to perform more important functions. For example, the Constitution could be amended by majority approval of two-thirds of the MPR.

The DPR and the government argued that individual citizens lacked standing to bring this challenge: they were not affected by the impugned provision because it regulated the rights of the DPR and its members, not the rights of individual citizens. The Court disagreed, holding that citizens were constitutionally entitled to participate in government by voting in elections, expressing their opinions about government performance, and by bringing applications

such as this. Citizens also indirectly participated through the decisions made by representatives they elected. For the Court, the rights to participate in government, and to control and supervise it, did not vanish after elections took place. But voters lost these rights if their representatives' powers to issue an opinion were unduly impeded. Individual citizens, therefore, had a sufficient interest to challenge these quorum and support requirements.

The Court does not appear to have been entirely consistent in its decision-making about standing for individual applicants. For example, in several cases the Court has denied standing to individuals to challenge the constitutionality of candidacy requirements imposed by statute unless they intend to stand for office. The *PKI case* (2003), an early landmark, is one such case. It involved a matter of significant democratic importance: whether former members of the Indonesian Communist Party (*Partai Komunis Indonesia*, or PKI) and other prohibited organisations could stand for election. Article 60(g) of the 2003 General Election Law had prohibited their nomination.

The Court granted standing to former members of these organisations, but denied standing to individual citizens who could not prove membership or other association with them. According to the Court, they could not, therefore, have suffered 'damage' because of the statute under review.[38] However, in light of the *KPK*, *Electricity Law* and *DPR Opinion* cases, the Court should probably have held that all Indonesian citizens have an interest in restrictions placed on fundamental democratic processes and entitlements – including the right to stand for election – and thus can challenge impediments to them. Alternatively, the Court could have accepted that a statute preventing individual citizens from voting for former members of the PKI caused them 'loss' sufficient to grant standing.

3.2.2 Taxpayers

Indonesian taxpayers are particularly likely to be granted standing to challenge almost any statute. For example, in the *Police and Army Voting case* (2014), discussed in Chapter 8, two citizens asked the Court to consider whether denying voting rights to army and police officers was constitutional. These citizens were not police or army officers, but rather were the former head of Indonesia's Human Rights Commission and a lawyer. Both were granted standing after producing their tax returns. Referring to several of its previous decisions, the Court concluded that 'Every taxpaying citizen has the constitutional right to

38 Those who lacked standing still achieved a desirable result. The MK eventually invalidated Article 60(g), and the effect of this decision is to make Article 60(g) unenforceable against all Indonesian citizens, not only the applicants with standing.

challenge every statute' (*Police and Army Voting case*, 2014, p. 22).[39] Similarly, in the *Simultaneous Elections case* (2013), discussed in Chapter 9, the Court granted standing to an applicant to challenge provisions in the 2008 Presidential Election Law that required legislative and presidential elections to be held together because he was a taxpaying Indonesian citizen. He presented his tax returns to demonstrate this. For the Court, the applicant had a legitimate interest in how his tax money was spent and having his constitutional rights protected.

The Court's emphasis on taxpaying citizens seems misplaced. While the Court has not, to my knowledge, denied standing to a citizen for being unable produce a tax return, giving taxpayers stronger grounds to bring challenges has no basis in law. Neither the Constitution nor the 2003 Constitutional Court Law requires citizens to pay tax to enjoy their constitutional rights. Indeed, Chapter XA of the Constitution, which contains the Bill of Rights, grants rights to 'all people', not just tax-paying citizens.

3.3 *Political Parties, Parliamentarians and Parliaments*

The Court's jurisprudence on whether political parties, parliamentarians and political institutions such as parliaments can bring constitutional challenges is complex and, in some cases, contradictory. On the one hand, both political parties and their serving parliamentarians will usually lack standing to challenge a general statute if that party or parliamentarian participated in deliberating and enacting it. This is so even if that party or parliamentarian opposed the statute but was outvoted. The Court has decided that a political party or parliamentarian disagreeing with a statute should propose legislative amendments in parliament rather than rely on the Court to strike it down.[40]

However, the Court has not denied standing in all constitutional challenges lodged by individual parliamentarians. Whether an individual who is also a parliamentarian can challenge the constitutionality of a statute depends on whether they do so as an individual, parliamentarian or party representative. If, for example, the applicant is directly and personally affected by the statute and does not bring the application as a representative of a particular political party, then standing will likely be granted. On the other hand, individuals purporting to represent their party are unlikely to be granted standing, unless they can demonstrate that the statute has damaged the party's constitutional entitlements.

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39 Citing the *State Bond case* (2003); *MA Law case* (2009); *MK Perpu case* (2014, p. 103).

40 *Lily Wahid case* (2010, para [3.9]); DPR Opinion case (2010, para [3.6]); *Oil and Natural Gas Law case* (2007, p. 98).

The Court has, for example, granted standing to individual parliamentarians to challenge the constitutionality of the statutory powers of parties to 'recall' their members – that is, to remove them from parliament by revoking their party membership. These cases are discussed in Chapter 8. In the *Lily Wahid case* (2010), for example, the Court held that the applicant, who brought her application as an individual parliamentarian, had a sufficient interest in the constitutionality of the statute for which she sought review. This was because the party that nominated her had used that statute to recall her.[41]

By contrast, in the *Christian Party case* (2009), the Court rejected a challenge to the recall provisions brought by applicants purporting to represent their parties, rather than as individual citizens.[42] The Court could not see how they suffered constitutional damage from the impugned provisions. A political party was left at no disadvantage by recall provisions. To the contrary, the provisions allowed parties to remove recalcitrant or errant members. Only individual recalled party members would suffer damage. The Court therefore rejected the claim (*Christian Party case*, 2009, p. 69).[43]

The Court reached a similar conclusion in the *Hulu Sungai case* (2009). This was brought by 14 applicants who were members of political parties elected to the Central Hulu Sungai County Parliament for 2009–2014. They objected to Article 354 of the 2009 Representative Institutions Law, which stipulated that the party obtaining the most votes in legislative elections would chair the local parliament. None of them were members of the party that had obtained the most votes and, thus, they could not lead the parliament. This, they claimed, discriminated against them as individual citizens. However, the Court denied standing, holding that the applicants had sought to enforce constitutional rights granted to parties, not individuals. They had, therefore, suffered no relevant constitutional damage (*Hulu Sungai case*, 2009, p. 54).

Government institutions, such as the national parliament (DPR), have also sought to enforce constitutional rights before the Court. The Court has granted

41 The Court could arguably have employed another ground to grant standing to her: the rationale for withholding standing to parliamentarians to challenge statutes on the presumption that they could seek to amend those statutes themselves did not apply in this case. Ms Wahid could not have sought to amend the statute under which she had been removed from parliament because she had already been removed from parliament.

42 The applicants were officials from three smaller parties (the Indonesian Christian Party, Independent Revolution Party, and Democratic Unity Party).

43 Additionally, the Court pointed out that it had already considered the same issue in the *Lily Wahid* case, which rendered the present application *nes bis in idem*. In any event, the statute for which review was sought had already been replaced by the time the Court heard this application.

standing to them, but only to pursue constitutional rights that the Constitution specifically grants to them as institutions. For example, Article 20A(2) of the Constitution sets out the rights and powers of the DPR, including to 'summon and question individuals' (the so-called *hak angket*, discussed later in this chapter) and to 'express an opinion' (see the *DPR Opinion case* (2010)). However, cases where the Court has granted standing to the DPR to challenge laws affecting its institutional rights and powers do not sit comfortably alongside earlier-mentioned cases in which the Court denied standing to political parties on grounds that they can seek to amend the impugned statute through parliamentary processes. This is because the DPR as an institution can, like these political parties, also seek to pass legislation, even relating to its own powers and functions.

A good example highlighting the significance of the capacity in which applicants bring their claims, and of divergences of opinion about standing amongst Constitutional Court judges, is the *DPD Domicile case* (2008). This challenge was brought by a variety of applicants, including the DPD as an institution, individual DPD members, NGOs and citizens. Their primary argument was that the Constitution required, first, that DPD candidates be domiciled in the province in which they stood for election to the DPD and, second, that they stand as individuals, not as representatives of political parties. Neither requirement was expressly included as a candidacy prerequisite in the 2008 General Election Law – an omission the applicants asked the Court to remedy.

The merits of the case are discussed in Chapter 7. As for standing, a five-judge-to-four majority granted it to the DPD as an institution, for the following reason. The DPD's main constitutional function was to advocate for the aspirations and interests of Indonesia's regions. To operate effectively, it needed to be able to ensure that its members 'came from' the region they represented and were independent of political parties. By contrast, the four minority judges decided that the impugned provisions did not affect the DPD's jurisdiction or powers, but rather only the right to stand as a candidate for the DPD. This was not a right that the institution could enjoy (*DPD Domicile case*, 2008, pp. 206–208). Only candidates had it. For similar reasons, the Court was split over whether the DPD members had standing. Again, a five-judge majority held that they did.

The applicants from NGOs were not granted legal standing, with only three judges upholding their right to bring the challenge. The six-judge majority held that they had no constitutional rights – as observers and reformers of election and parliamentary reform – that the impugned statute had damaged (*DPD Domicile case*, 2008, pp. 208–9). The three-judge minority disagreed, holding that the Court had long granted standing to

NGOs provided that their articles of association related to the statute for which review was sought.

The citizens were also not granted legal standing. The five-judge majority ruled that citizens' constitutional rights to stand as DPD candidates were not damaged by the impugned provisions. To the contrary, competition was appropriate and healthy for a democracy, which was beneficial to citizens. Only individuals who sought to nominate themselves as DPD candidates had a sufficient constitutional interest in bringing the application. The applicants did not fall within this category. By contrast, the minority held that citizens had an interest in their candidates being both domiciled in their province and independent (*DPD Domicile case*, 2008, p. 209).

3.4 *Reviews Granted Despite Lack of Standing*

The Court has heard and decided upon the merits of several cases even after denying the applicant standing. The Court has usually justified doing this by declaring that the statute under review raised a matter of great public interest or importance. The Court proceeded this way in both the *Representative Institutions Law* (2003) and *Manoppo* (2004) cases.

In the *Representative Institutions Law case* (2003), a group of 38 lawyers asked the Constitutional Court to review Articles 30(2)–(5) of the 2003 Representative Institutions Law. These provisions regulated the DPR's *hak angket* – the right to compel a person to attend a DPR meeting to provide information about a particular matter and to detain them for up to 15 days if they fail to comply (*Representative Institutions Law case*, 2003, p. 6). The applicants argued that the *hak angket* enabled the DPR to 'enter the judicial realm' and placed it 'above the law and valid and democratic governance', because it allowed the DPR to detain any person without explanation or formal process (*Representative Institutions Law case*, 2003, p. 33).

The Court held that the *hak angket* did not damage the applicants' constitutional rights, because it was explicitly permitted by the Constitution. It also advanced the interests of the nation and posed no threat to law-abiding citizens (*Representative Institutions Law case*, 2003, pp. 31, 33–34). Nevertheless, the Court decided that it 'needed to consider the case's merits regardless' (*Representative Institutions Law case*, 2003, p. 32). The Court did not explain why it did not apply Article 51(1) and throw out the case. Ultimately, however, the Court decided that the applicants had provided insufficient evidence to support their claims about the *hak angket* (*Representative Institutions Law case*, 2003, p. 34).

In the *Manoppo case* (2004), the applicant sought review of Article 68 of the 2002 KPK Law, claiming that it had retrospective application, in breach of Article 28I(1) of the Constitution, which gives people a right to be free from

such laws.[44] The Anti-corruption Commission (KPK) was established to handle corruption investigations separate from existing police and prosecution apparatuses that were widely considered to be corrupt. Article 68 of the 2002 KPK Law stated that the KPK could 'take over' all preliminary enquiries (*penyelidikan*) and investigations (*penyidikan*) into, and prosecutions of, crimes of corruption, which had commenced before the KPK was formed. Manoppo complained that the KPK had used the provision to investigate him for a crime allegedly committed before Article 68 itself was enacted, thereby violating Article 28I(1).

The Constitutional Court held that Manoppo's constitutional rights had not been damaged by Article 68. Manoppo himself had admitted that the KPK had never 'taken over' his case – he had only ever been investigated and prosecuted by the KPK. For the Court, it was 'very evident and clear' that the applicant had not proved his arguments (*Manoppo case*, 2004, p. 66). Despite deciding that Manoppo lacked standing to challenge Article 68 because it had not been applied to him, the Court decided to evaluate the constitutionality of the provision 'so that it does not create doubt in its implementation in the future and in the interest of legal certainty' (*Manoppo case*, 2004, p. 67).

The Court's motivations for continuing to the merits of the *Manoppo* (2004) and *Representative Institutions Law* (2003) cases despite the applicants' lack of standing appear well-intentioned. The Court seemed keen to clarify important constitutional issues without waiting for an applicant with standing to question them. However, by ignoring Article 51(1) of the 2003 Constitutional Court Law in some cases, the Court has obscured how it will apply its standing rules in future cases. Indeed, most cases brought before the Court are of similar 'importance' to the *Manoppo* (2004) and *Representative Institutions Law* (2003) cases – if not greater – perhaps justifying the Court setting aside the standing principles altogether.[45]

3.5 *Court Costs and Timing*

The Court does not impose filing or other court fees.[46] However, applicants are responsible for their own costs, including their legal representation and any

44 For discussion of Article 28I(1), see Chapter 6.

45 One remaining question is whether, in a future case, the Court might ignore the standing rules to invalidate a statute. The *Manoppo* (2004) and *Representative Institutions Law case* (2003) cases confirmed the constitutional validity of the statute in question.

46 Article 35A of the 2011 Amendments to the 2003 Constitutional Court Law; Article 6(7) of Constitutional Court Regulation 06/PMK/2005 on Procedural Guidelines in Judicial Review Cases.

experts they call, and they cannot seek reimbursement for costs, even if they win.[47]

The Constitutional Court appears to hear and decide cases relatively quickly, at least by international standards. As we shall see in Chapter 10, the Court is bound by strict deadlines for resolving most electoral disputes. While no such deadlines apply for constitutional review cases, the Court is rarely criticised for tardiness. For example, in 2012, the Court's 'fastest' case was completed in 12 days, and its slowest took 309 days (Pramesti, 2013).

4 Decision-Making of the Constitutional Court

4.1 *Structure of Judgments*

The Constitutional Court's judgments tend to follow a common structure.[48] First, the Court sets out the parties' applications; written submissions from the national parliament, president and any related parties (*pihak terkait*); and any witness statements. Most of these appear to be simply cut and paste from the original documents lodged by the parties and, together, they comprise the bulk of most Constitutional Court judgments. The Court then commences its *Pertimbangan Hukum* – the 'legal considerations'. This section opens with the Court considering whether it has jurisdiction to hear the case (under the heading *Kewenangan Mahkamah*, the Court's Jurisdiction) and whether the applicant has standing (under the heading *Kedudukan Hukum* (*Legal Standing*) *Para Pemohon*, the Legal Standing of the Applicants). Following this is the *Pendapat Mahkamah* (Court's Opinion), in which the Court usually identifies the legal issues raised in the application and summarises the arguments made by the applicant(s), government and related parties. In most judgments, the Court will then address each argument, discussing relevant legal issues, describing its view of the relevant constitutional and statutory provisions, and sometimes mentioning its own previous decisions in similar cases. The Court then declares whether it 'upholds' (*mengabulkan*) these arguments in their entirety or in part, or whether they lack legal merit (*tidak beralasan hukum*), almost always accompanied by reasons. Under the heading of *Mengadili* (Decides), the Court sets out its formal Holding (*Amar Putusan*) – usually a

47 This rule about costs is not exclusive to the Constitutional Court. Rather, it applies in all Indonesian courts.

48 The Court has made minor adjustments to this structure over the years. What follows is a description of the way the Court structured its decisions at time of writing.

bare declaration in which the Court repeats whether it upholds or rejects. Any minority judgments are then reproduced.[49]

Employing a traditional civil law judicial decision-writing style (Lasser, 2004),[50] each paragraph of majority or full-court Constitutional Court decisions begins with '*Menimbang*' ('considering', or 'whereas') or '*Menimbang bahwa*' ('considering that'), and ends with a semi-colon. Many contain entire sentences between the 'Menimbang' at the beginning of the paragraph and the semi-colon at its end.

Many, if not most, of the decisions examined for this book were not clearly structured or written. The judges often did not present their arguments in a logical or chronological way. Some judgments jumped around, raising issues but then not dealing with them until later, without further explanation. Many decisions contained significant unnecessary repetition. In its earlier decisions in particular, the Court often set out constitutional and statutory provisions several times,[51] and some judges tended to rehearse their arguments.[52]

4.2 *Style and Extrinsic Material*

Within the confines of this traditional civil-law style, the Court's decision-making has changed significantly over time, apparently following the preferences of its chief justices. Under its founding Chief Justice, Jimly Asshiddiqie, the Court's decisions were detailed and discursive, reading almost like academic papers.[53] This is unsurprising given that Asshiddiqie was, and remains, a renowned academic expert on Indonesian constitutional law. He had long been Professor of Law at the University of Indonesia before joining the Court and has written many text books. His scholarly writing style appears to have influenced the way the Court wrote its judgments under his leadership. The discursiveness of the Court's decisions was also consistent with Asshiddiqie's concerns, mentioned earlier in this chapter, that the Court develop a body of constitutional jurisprudence. Reading these earlier decisions, an impression emerges of a Court trying hard to produce convincing decisions that lawyers,

49 In its first few years, the Court included any dissenting opinions before the final holding.

50 It seems obvious that the Constitutional Court is strongly influenced by the style used in other Indonesian courts, and that, in turn, is influenced by the Dutch model, itself drawing heavily from the French – the most widely emulated judicial system in the world (Lafon, 1996, p. 20).

51 For example, Article 28I(1) of the Constitution was set out at least three times by the majority in the *Soares case* and then again by minority judges (2004, pp. 47, 48, 51).

52 For example, in the *Manoppo case*, the Court repeated its arguments about Articles 68, 70 and 72 of the 2002 KPK Law (2004, p. 72). See also *Judicial Power Law case* (2004, p. 13); *KPK Law case* (2003, pp. 112–114); *Chamber of Industry case* (2004, p. 68).

53 See, for example, *Water Resources Law case* (2004, pp. 486–506).

government officials and even citizens might read and then use to anticipate how the Court views particular issues and might decide future cases.

To this end, under Chief Justice Asshiddiqie, the Court often appealed to extrinsic sources to support its decisions. It commonly referred to the works of legal scholars, particularly foreign scholars.[54] However, the purpose of citing scholars was never to provide alternative or contrasting views to those the Court eventually followed. Rather, these scholars were used always to support the Court's arguments.[55] Similarly, the Court often referred to international law, but to buttress its decisions rather than providing contrasting views (Zhang, 2010; Butt, 2014b).[56]

When Mahfud became Chief Justice in 2008 the Court's decision-making style changed markedly. In particular, the Court's decisions became noticeably shorter. The average length of the *Pendapat Mahkamah* (Court's Opinion) in the 147 cases handled under Jimly Asshiddiqie's leadership was 2017 words. For the 404 challenges brought under Mahfud's Chief Justiceship, the average decision length dropped to 1377 words. Of course, these bare figures say nothing about the quality of the Court's reasoning – only that the Court produced less of it.

Nevertheless, comparing the decisions under Asshiddiqie and Mahfud leaves the overall impression of a decline in quality of legal argument under Mahfud, even though it still surpassed that of other Indonesian courts, including the Supreme Court. While not entirely discarded, the Constitutional Court's references to legal scholarship and international law fell dramatically. In some cases, the Court even found constitutional fault with legislation without specifying the constitutional provisions violated.

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54 For example, the work of Gustav Radbruch was referred to in the *Bali bombing* case (2003, pp. 36–37) and that of Kelsen in the *Chamber of Industry Law case* (2004, p. 79). On the importance of 'doctrine' produced by legal scholars within the civil law tradition, and in Indonesia, see Bell (2008).

55 While the Court has more often referred to scholars associated with the European civil law tradition – such as Gustav Radbruch and Hans Kelsen – it has also referred to scholars, and even judges, of the common law tradition. For example, in the *Representative Institutions Law case* (2003, p. 30), the Court referred to the work of Ronald Dworkin (1978 and 1985) on constitutional rights. In the *Advocates' Law case No 2* (2004: 33), the Court referred to a passage from the English case of *R v Lord Chancellor ex p Witham* (1998) on the right to a fair trial. The Court appeared to obtain the passage from Helen Fenwich & Gavin Phillipson (2003), *Text, Cases & Materials on Public Law & Human Rights*, 2nd edition, p. 143, which it cited in its judgment.

56 See, for example, the *PKI* (2003); *Bali Bombing* (2003); *Abdurrahman Wahid* (2004); *Soares* (2004); and *Death Penalty* (2007) cases.

For example, in the *Wedlock case* (2010), discussed below in Chapter 6, the Court reproduced and summarised the parties' arguments, including their references to various constitutional provisions. However, in its 'legal opinion' (*Pendapat Mahkamah*) section the majority mentioned as the bases for its decision only vague concepts of justice, fairness, legal certainty and legal protection. It did not specify the constitutional provisions that advanced these concepts as constitutional rights. Only Justice Indrati, in a sole concurring judgment, clearly identified a constitutional ground – Article 28B(2) of the Constitution – to justify the Court's intervention. Similarly, in the *Labour Union case* (2009), the Court declared provisions of the statute under review conditionally unconstitutional using vague notions of justice and the need to legally protect workers and unions, without mentioning constitutional provisions.

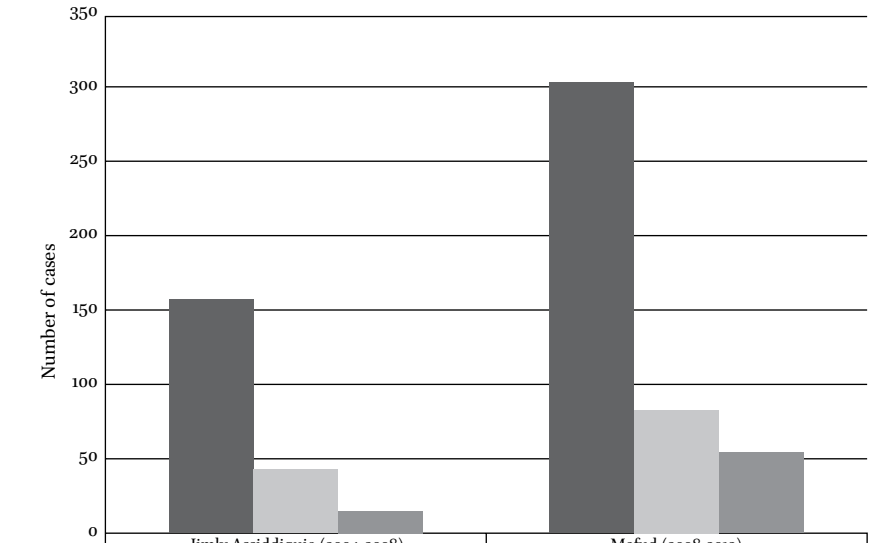
Decisions which invalidate statutes but do not mention the constitutional basis for that invalidation are, of course, highly problematic. If the Constitution is in fact the basis for a decision, then the Court can simply mention the relevant provision. By failing to do this, the Court opens itself to criticism that there was 'something else' behind the decision that it did not disclose – such as personal policy preferences or, worse, impropriety.

The Constitutional Court was hardly timid under Jimly Asshiddiqie. As we shall see in subsequent chapters, the Court had been both 'active' and 'activist' from its earliest days (Butt, 2007a). However, the Court became perceptibly emboldened under Mahfud. During Mahfud's time as Chief Justice, for example, the Court moved towards emphasising 'substantive justice' over 'procedural justice' (Budiarti, 2012, p. 80). While the Court did not clearly articulate what 'subjective justice' meant, it appeared concerned to prevent the enjoyment of important constitutional rights ('substantive justice') from being hampered by procedural limitations or administrative impediments (*East Java case*, 2008, para [3.27]). Many of the Court's 'landmark' decisions were issued in the name of substantive justice, perhaps most notably the self-proclaimed 'spectacular', 'extraordinary' and 'historic' *East Java case* (2008) (Budiarti, 2012, pp. 83–84), discussed in Chapter 10.

Under Mahfud, the Court also issued many more conditional (un)constitutionality decisions than under Asshiddiqie, as indicated in Figure 4. These types of decisions are discussed in Chapter 6, where I show that they are the primary method by which the Court has expanded its jurisdiction and perhaps even usurped the legislative function.

One explanation for the shift in decision-making style is Mahfud's overt political aspirations. Like Asshiddiqie, Mahfud was a well-known law Professor, at the well-regarded Indonesian Islamic University in Yogyakarta, and had some impressive publications;[57] but his desire to stand for president or vice-president

57 Particularly Mahfud (1998).



	Jimly Assiddiquie (2004-2008)	Mafud (2008-2012)
Total cases	157	303
Granted	43	83
Conditional	15	54

FIGURE 4 *Conditional (un) constitutionality decisions*

in the 2014 elections was well known.[58] Under Mahfud, the Court's decisions possibly reflected this aspiration, becoming arguably more concerned with resolving immediate political issues and building popularity than with applying or creating legal principles that could be readily applied in future cases.[59]

4.3 *Use of Precedent*

As a former Dutch colony that inherited the Dutch legal system upon Independence, Indonesia follows the civil law tradition. In general, civil law countries do not have the system of precedent that defines common law jurisdictions. Rather, for various historical reasons (Merryman, 1985), judicial decisions are generally not formal sources of law. Civil law judges are not required to follow the prior decisions of judges in higher courts, or courts of

58 Failing to secure nomination, Mahfud ultimately became campaign manager for the Prabowo-Rajasa pair for the 2014 presidential election. To be sure, Asshiddiqie also commonly indicated that he desired to enter politics after retiring as a Constitutional Court judge, but was arguably less open about this than Mahfud.

59 One example of this was arguably the *BP Migas case* (2012), discussed in Butt and Siregar (2013).

the same level as their own. In pure civil law theory, most types of judicial decisions bind only the parties in the case before the judge, not judges hearing similar cases in the future. However, in practice, most civil law countries have something akin to system of precedent, albeit informal and non-binding, with many courts treating previous decisions – particularly those of higher courts – as highly persuasive and authoritative.[60]

In Indonesia, too, it is generally considered preferable for courts to follow prior decisions of higher courts, particularly decisions of the Supreme Court (*Mahkamah Agung*), though some scholars debate how strictly this preference should be followed. Some commentators argue that jurisprudence (*yurisprudensi*) has, in fact, effectively become a source of law in Indonesia,[61] despite not being formally binding (Soemardi, 1980, p. 44; Sudarsono, 2001). It is said that, like civil law judges elsewhere, Indonesian judges often follow the *yurisprudensi* of higher courts for reasons that are 'psychological or practical' (Sanusi, 1984, p. 83). These include fearing reversal by a higher court for ignoring jurisprudence; agreeing with the principle and the reasoning underlying the jurisprudence; following decisions of higher courts out of respect of, or fear of rebuke from, them; and believing that following prior decisions will increase 'legal certainty', thereby promoting predictability, consistency, efficiency and hence domestic and international credibility.[62] However, other Indonesian scholars maintain that civil law judges follow the 'principle of freedom' (*asas bebas*) rather than the 'principle of precedent' (*asas precedent*) found in common law countries (Purbacaraka and Soekanto, 1979, p. 44; Notopuro, 1987, p. 14). They argue that judicial independence does not require merely freedom from government interference; it requires also that judges are not influenced by other judges – even the prior decisions of senior judges (BPHN, 1993, p. 21).

However, constitutional adjudication is quite different to the ordinary civil and criminal cases to which most of these scholars' opinions relate. This is primarily because decisions of many constitutional courts, including Indonesia's, apply generally (*erga omnes*) rather than just to the parties. They therefore potentially affect the interests of many, if not all, citizens. In constitutional

60 See Glendon, Gordon and Osakwe, 1985, p. 135; Merryman, 1985, p. 41; Dawson, 1994, p. 404; Lasser, 1995, pp. 1350–1351; Bell, 1997, p. 1254; De Cruz, 1999, p. 245.

61 Included amongst those who see jurisprudence as a formal source of law are Soepomo, 1958, p. 125; Utrecht and Moh Saleh Djindang, 1983, pp. 162–163, note 174.

62 Isnaini, 1971, pp. 20–21; Soemardi, 1980, p. 41; Utrecht and Moh Saleh Djindang, 1983, p. 123; Sanusi, 1984, p. 83; Mertokusumo, 1993, pp. 39, 41; Lotulung, 1997, pp. 11–12; Sudarsono, 2001, p. 88. This view is said to be shared by judges in many other civil law jurisdictions (Glendon, Gordon and Osakwe, 1985, p. 136; Dawson, 1994, p. 420; Bell, 1997, pp. 1260, 1271; De Cruz, 1999, pp. 245–46).

cases, then, consistency of decision-making is arguably more important than in these other types of cases.

What approach has the Indonesian Constitutional Court taken to its previous decisions? In its first few years, the Court referred to its prior cases only occasionally. This was partly because the Court was so new that it had no body of previous cases to which it could refer. However, even when relevant previous cases existed and the Court referred to them, its references were not instructive or informative. For example, the Court was asked to review the 2004 Bankruptcy Law in the *Bankruptcy Law case No 1* (2005) and the *Bankruptcy Law case No 2* (2005). In the latter case, the Court referred to its earlier decision and stated:

> the Constitutional Court's statements in that case, to the extent that they are relevant to the substance of the present application, become part of… this decision.
>
> *Bankruptcy Law case No 2*, 2005, p. 44

The Court did not identify the statements in its previous decision to which it referred, so a reader would not know which part of the earlier case the Court incorporated into the later.

Further, in its early decisions the Court often chose not to refer to previous cases when doing so would have been efficient and effective. Some cases involved the same constitutional provisions and similar issues; but rather than referring to or citing a previous decision, the Court preferred to tackle the provisions and issues afresh – as though its previous decisions had never been made. For example, in its first three years, the Court heard several challenges to the constitutionality of retroactive laws. The first was the famous *Bali Bombing case* (2003), in which long majority and minority decisions were produced. But this case was not mentioned in the *Soares* (2004) and *Manoppo* (2004) cases, even though these cases also raised retrospectivity. The judges traversed the same legal arguments all over again.

In more recent years, the Court has referred to previous decisions far more regularly. The Court has also set out long passages from previous decisions – sometimes several pages long. These passages are far more informative than the vague references to previous cases the Court provided in cases such as the *Bankruptcy Law case No 2* (2005), mentioned above. Of course, greater reference to and reliance upon previous cases is undoubtedly a result of the Court now having many previous decisions upon which to draw. Indeed, the Court now commonly refuses to hear cases on *ne bis in idem* grounds – that is, the Court has already heard a challenge to the same statutory provision on the same constitutional grounds.

As the Court has developed, it has likely come to understand that its credibility hinges, at least partly, on consistent and predictable judgments. It has also realised that referring to previous decisions can strengthen and legitimise its decisions. As we shall see in later chapters, doing so helps when the Court's decisions are politically or publicly unpopular.

4.4 *Dissents*

The power of judges to issue dissenting opinions is traditionally associated with the common law tradition. However, dissenting decisions have been permitted in most Indonesian courts since 2004.[63] The Constitutional Court issues them regularly. Under its first two chief justices, the Court issued 104 dissents in 494 cases. Dissents were three times more common under Asshiddiqie than under Mahfud. By my count, under Asshiddiqie's leadership, at least one dissenting judgment was handed down in 37.75% of cases heard – that is, in 57 of 151 cases. By contrast, under Mahfud, only 13.7% of cases contained dissents – that is, 47 of 343 cases. These figures seem to support observations made above that, under Asshiddiqie, the Court was more 'academic' in its decision-making. Not only were its decisions longer; differences of opinion were openly tolerated or even encouraged. Such a diversity of views on the bench was not as strongly supported by Mahfud, who might have been more interested in the Court providing more decisive solutions.

The Court has not yet, to my knowledge, articulated the precise purposes of its dissenting opinions, and the implications that can be drawn from them. One of the main purposes of dissents, expressed in legal scholarship,[64] is to make judicial decision-making more transparent, allowing readers to see who disagrees with what, why there is disagreement, and the extent of that disagreement. This purpose of dissents is arguably met in the Indonesian Constitutional Court, at least to the extent that majority and minority decisions adequately explain the legal reasoning they employ. However, Indonesian Constitutional Court dissents appear to do little for another commonly-proclaimed benefit of dissenting opinions: enhanced judicial accountability. This is because disagreement between the majority and minority is almost never mentioned in majority judgments and only rarely in minority

63 In fact, dissenting opinions were first permitted in Indonesia's commercial courts, under the 1998 Bankruptcy Law. As for other Courts, Article 19(5) the 2004 Judicial Power Law, requires that, if presiding judges cannot agree about the decision they should reach in a case they have heard together, 'the opinion of the judge which is different must be included in the decision'.

64 On these functions of dissents, see Blomquist (2004, pp. 77, 83); and Mattei (1994, p. 206).

judgments. Even when a minority mentions the majority opinion, it rarely, if ever, 'engages' with that opinion, such as by asserting why its opinion is preferable.[65] One judge opined extramurally that for a dissenting judge to comment on a majority decision, and vice versa, is 'unethical' (Bisariyadi et al., 2004, p. 35).[66] Though the Court has not explained this lack of engagement, one can speculate that its judges are either unaware of the purposes which dissents can serve or are reluctant in their decisions to confront other members of the bench.

Another unresolved issue is the weight of unanimous decisions compared with split decisions. It is tempting, particularly from a common law perspective, to presume that the 'strength' of a judgment is diluted by one or more dissenting opinions. However, there has been no discussion, let alone agreement, in Indonesia about the relative weight or authority of unanimous decisions compared with split decisions. In some cases previous dissents have been given no weight. For example, in the *Death Penalty case* (2007), a six-judge-to-three majority upheld the constitutionality of the death penalty for narcotics offences but several years later in the *Violent Murder case* (2012) upheld it unanimously for robbery occasioning death (Butt, 2014a). In the later case, the Court referred to the *Death Penalty case* (2007) to support its decision, but referred only to the majority judgment, entirely ignoring the dissent.

5 Enforcement of Constitutional Court Decisions

The Indonesian Constitutional Court has no express power to enforce its decisions or impose penalties for failure to comply with them. Article 24C(1) of the Constitution and Article 10 of the 2003 Constitutional Court Law merely specify that the Court's decisions are 'final'. According to the Elucidation to Article 10(1) of the 2003 Constitutional Court Law, 'final' means that

> Constitutional Court decisions become binding from the moment they are announced, and that no [further] legal avenues are available…

Similarly, Article 47 of the 2003 Constitutional Court Law states that Constitutional Court decisions become binding after they are announced in open court.

65 The only case in which I found a cross-reference to the majority decision in the minority decision was in the *Saurip Kadi case* (2008), discussed in Chapter 9.

66 Under Article 32(6) of Constitutional Court Regulation 06/PMK/2005 on Procedural Guidelines in Judicial Review Cases, a dissenting judge can even request that his or her dissent not be included in the decision.

Neither the Constitution nor the 2003 Constitutional Law state that the government must follow the Constitutional Court's decisions. However, the Constitution implicitly requires compliance. It stipulates that the legislature and executive must adhere to the Constitution when performing their functions. Article 4 of the Constitution states that the President 'holds government power *in accordance with* the Constitution' (my emphasis). The Presidential Oath in Article 9 of Constitution requires the President to promise to uphold the Constitution. As for the legislature and other lawmakers, Article I of the Constitution's Transitional Provisions provides that 'all laws in existence remain in force until replaced in line with the Constitution'. Presumably, the DPR must ensure that the statutes it enacts, and the President must ensure that the presidential and government regulations he or she signs, comply with the Constitution. If the arms of government have an obligation to comply with the Constitution, then they must also comply with Constitutional Court decisions. This is because the Constitution itself provides authority to the Constitutional Court to review statutes for compliance with the Constitution. Because its decisions 'enforce' the Constitution and are binding, the government must follow them as part of its obligation to comply with the Constitution.

5.1 *Government Resistance*

The government's response to Constitutional Court decisions has changed over time. In the Court's earliest days the government actively sought to circumvent some of them. In particular, the government used lower-level regulations to replace statutory provisions, and even entire statutes, that the Court invalidated. As discussed in Chapter 4, the Constitutional Court's constitutional review jurisdiction is strictly limited to assessing whether statutes violate the Constitution. It has no power over lower-level laws, including regulations. The Court cannot assess whether these are constitutional, or even whether they are consistent with the legislation that authorised them.

Perhaps the most blatant example of the government seeking to avoid a Constitutional Court decision was its response to the *Electricity Law case* (2003), discussed in Chapter 6. In its decision, the Constitutional Court invalidated the entire 2002 Electricity Law for violating Article 33(2) of the Constitution, by allowing excessive private sector involvement in the electricity sector. Article 33(2) requires that 'Branches of production which are important to the state and affect the lives of the people are to be controlled by the state'.[67]

67 Incidentally, the Court has, since its decision in the *Electricity Law case* (2003), continued to take a protectionist view and further narrowed the scope of permissible private sector involvement (Butt and Siregar, 2013).

This decision left the government in a difficult position: the 2002 Electricity Law had been requested by the International Monetary Fund as a condition for part of its financial bailout after the 1997 Asian Economic Crisis. The government had also been unable to meet demand for electrification across Indonesia and had sought to remedy this by attracting private sector involvement through the Law.

Within two months of the Court's decision, the government issued Government Regulation 3 of 2005. The Regulation has been described as being 'not much different' from the invalidated Electricity Law.[68] Hotma Timpul, a Jakarta lawyer, described the Regulation as a re-enactment of the Electricity Law 'in new clothes' (Hukumonline, 2005b). Even a senior government official admitted that the Regulation was issued to provide certainty for private sector investors in the aftermath of the Constitutional Court's decision (Hukumonline, 2005a). He hoped that the Regulation would enable the state-owned National Electricity Company to invite companies to compete for tenders (Hukumonline, 2005a).

While the Government Regulation was not framed as a replacement to the 2002 Electricity Law the Court had invalidated,[69] it appeared directed towards mitigating some of the effects of the Court's decision. Part (a) of the Regulation's Preamble reveals an aspect of the law's intent:

> [W]ithin the framework of increasing the availability of electricity for the public interest, the roles of cooperatives, State-Owned Enterprises, Regional State-Owned Enterprises, the *private sector*, community groups and *individuals* must be increased [my emphasis].

Article 6 of the Regulation stated that a permit could be awarded to a cooperative or 'another enterprise' to provide electricity. Articles 6(2) and 6(3) provide that 'enterprises' include the private sector and individuals. Article 11 states that permit holders can buy and sell electricity. These provisions appear to contravene the Constitutional Court's decision in the *Electricity Law case* (2003), because they allow the state to evade its obligations under Article 33(2) by relinquishing its 'control' over the provision of electricity to the private sector. However, the Court could do nothing about the Regulation, because, as mentioned, it only has jurisdiction to review statutes.

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68 Personal communication with Fultoni, Secretary of KRHN (Konsorsium Reformasi Hukum Nasional, National Legal Reform Consortium), 8 May 2005.

69 Although the Constitutional Court's invalidation of the 2002 Electricity Law is mentioned in passing in the Elucidation to the Regulation.

Similarly, the government issued a government regulation about water resources in 2005,[70] apparently anticipating that the Court would strike down provisions of the 2004 Water Resources Law that sought to increase private sector involvement in water resource management. Ultimately, the Constitutional Court did not invalidate any part of the Water Resources Law, and in any event it is arguable that the activities permitted under the Regulation were permitted under the Water Resources Law. Yet, given its timing, the Regulation seems to have been intended as a pre-emptive strike by the government against a worst-case-scenario decision of the Court.

The Court appeared not to consider the consequences of issuing a 'zero-sum' decision in the *Electricity Law case* (2003) apparently exceeding the 'tolerance interval' of the government and inviting push-back (Epstein, Knight and Shvetsova, 2001). The government's response to the decision was a worrying sign for the future viability of the Constitutional Court and, indeed, Indonesian constitutionalism itself. If the government was willing to bypass the legislative process altogether to enact laws of questionable constitutionality, then the Constitutional Court would quickly become redundant. The government could issue as regulations any laws that had not survived judicial review or that it anticipated might not survive judicial review, if challenged. The response also prompted fears that the government would return to the practice of 'legislating' by regulation – one of the hallmarks of the New Order, under which the regime issued laws without parliamentary or public debate or scrutiny (Damian and Hornick, 1972, p. 511; Rohdewohld, 1995, p. 19).

These fears intensified after these early attempts at circumvention were matched with public criticism by parliamentarians, executive officials and some commentators against the Court invalidating statutes. In the words of Benny Harman (2004, p. 237), a politician from the Democrat Party (*Partai Demokrat*) and prominent member of the DPR Commission on Legal Affairs:

> our current political elite, particularly those who have legislative power (the DPR and President), apparently are not prepared or ready to face Constitutional Court decisions, which are still considered to denigrate the statutes enacted by the DPR.
>
> HARMAN, 2004, p. 237

Complaints from these quarters were hardly surprising given that the Constitutional Court was new and that Indonesia had so recently emerged from

70 Government Regulation 16 of 2005 on the Development of a Drinking Water Availability System.

decades of authoritarianism, during which no judicial institution had performed constitutional review.

5.2 *Explaining Government Compliance*

Nevertheless, fears that the Court might become irrelevant were largely unrealised. Early defiance aside, the government has usually respected the Court's decisions; there have been few, if any, further attempts to defy them. While politicians still publicly criticise particular decisions, they often acknowledge that the Court's decisions are binding and reluctantly pledge to follow them. Some commentators have argued that the Constitutional Court's reputation for integrity and impartiality – at least before Akil Mochtar's arrest in October 2013 – garnered public support for it, which in turn pressured the government to comply with its decisions (Mietzner, 2010, p. 399; Nardi, 2011, p. 9). As Horowitz (2013, p. 243) puts it, the Court 'built up a stock of political capital because of its apparent integrity and good faith, despite much criticism of individual decisions'. Public support has been identified as a factor pushing compliance with constitutional court decisions in other countries (Vanberg, 2005).

Also possible is that the various 'fragmentation' and 'insurance' theses developed to explain increasing judicial power, independence and assertiveness (Hilbink, 2012, pp. 589–591), hold true in Indonesia. After the government's initial reaction to the *Electricity Law case* (2003), politicians and government officials appear to have come to realise that, in the long run, complying with the Court's decisions was in their own interests. More specifically, they might have realised that defying a Court decision that went against them made it more likely that their opponents would do the same in a future case. As Horowitz (2013, pp. 236–237) puts it, much of the post-Soeharto period has witnessed:

> a factional equilibrium, in which courts, especially the newly created constitutional court, [have had] room to operate with independence, even thwarting government policy on constitutional grounds. No one considered disobeying inconvenient judicial judgments. There was no equivalent of Mahathir, who could single-handedly dismiss judges. If anyone had tried to use formal power for this purpose, others would have stepped up to prevent it, for such an action would have constituted an implicit threat against them, too.

A more pragmatic view is that the Court learned from bitter early experience and, over time, particularly during Mahfud's term as Chief Justice, developed types of

decisions that require no legislative response.[71] The Court now rarely issues decisions that leave legal vacuums. Most of the Court's decisions which find constitutional fault with a statutory provision are self-enforcing. The Court employs two particular practices to achieve this. The first is to invalidate only selected words in provisions, thereby changing the meaning of the provision to make it constitutional.[72] The second is declaring statutory provisions to be conditionally constitutional or conditionally unconstitutional. As discussed in Chapter 6, in these decisions the Court declares that a statute is constitutional provided that it is interpreted in a way specified by the Court, or unconstitutional unless interpreted in that way.

Constitutional courts in other countries – reluctant simply to invalidate legislation, leave a legal vacuum and force legislative response – have taken a similar course, fearing government backlash (Ginsburg, 2003, pp. 104–105). They have avoided zero-sum invalidations where possible, preferring 'intermediate' decisions which

> identify the constitutional defects of a given statute but do not immediately invalidate it. Courts, for example, sometimes suspend the effects of their decisions declaring a law unconstitutional in order to give the parliament enough time to repair the defects. In other cases, they issue a "reconstructive" decision that directly amends the defective statute to make it comport with the Constitution. These and other techniques have been crafted to satisfy practical needs. Experience has shown that the dichotomy between striking down statutes, on the one hand, and fully upholding the constitutionality, on the other, is unacceptably rigid.[73]
>
> FERRERES-COMELLA, 2009, p. 9

These types of 'tempering techniques' appear to show deference to parliament (Butt, 2007a). However, as we shall see in Chapter 6, some of them – particularly conditional constitutionality – have since evolved into tools the Court wields to increase its powers, arguably to include lawmaking.

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71 There is little evidence of the DPR expressly taking action in response to Constitutional Court decisions, such as by amending invalidated legislation. The only example I have discovered is the 2008 Amendment to the 2004 Regional Government Law, the Preamble of which mentions that one of the purposes of the Law is to respond to the *Independent Pemilukada Candidates case* (2007), discussed in Chapter 9.

72 See for example, the *Parliamentary Threshold and Party Verification case* (2012), discussed in Chapter 8.

73 For similar observations about the Taiwan Constitutional Council, see Garoupa, Grembi and Lin (2011, pp. 16–17) and the French, German and Italian Constitutional Courts, see Nardini (1999, p. 38).

PART 2

Constraints on the Constitutional Court's Decision-making and Jurisdiction

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CHAPTER 4

External Constraints

The Constitution and the Legislature

This Chapter discusses the external constraints on the exercise of the Court's constitutional review jurisdiction. Its main foci are the limits imposed by the Constitution and by statute upon the Court's power of constitutional review. These are not the only constraints that operate upon the Court. As we shall see in Chapter 5, the Court has, through principles developed in its decisions, constrained the way it exercises its powers much more than formally required. The Court has also given the legislature significant latitude to enact statutes within the broad confines of the Constitution, establishing what has become, in effect, a presumption of constitutionality. Yet the Court has also broken free of the limitations it has set for itself, and those imposed by statute, perhaps even by the Constitution. The cases where the Court has done this, and the principles the Court has developed, are discussed in Chapter 6.

1 Constitutional Constraints

The Constitutional Court's review jurisdiction is primarily demarcated in the Constitution. The national legislature, by enacting the 2003 Constitutional Court Law, and amendments to it in 2011, further delineated the Court's jurisdiction within the confines established by the Constitution. In particular, the Constitution and the 2003 Constitutional Court Law seek to limit the types of laws the Court can review and the electoral disputes it can handle. They also seek to restrict the Court to issuing specifically-worded 'holdings'.

As mentioned in Chapter 2, Article 24C(1) of the Constitution grants the Court power to assess whether national statutes (*undang-undang*) – laws enacted by the DPR – are consistent with the Constitution and to strike them down if they are not. Two particular aspects of Article 24C(1) warrant further examination. The first is that the Court cannot field 'constitutional complaints' to review the constitutionality of other types of laws or the actions of government. The second is that the Court can only invalidate unconstitutional statutes or parts of statutes. It cannot add to statutes to make them constitutional. In other words, the Court is a 'negative' rather than a 'positive' legislator. I now turn to discuss these two issues.

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1.1 *Limitation of Constitutional Review to Statutes*

Though some constitutional courts can review lower-level laws, such as executive-level regulations, or even government actions (Autheman, 2004, pp. 3–4), many of the world's constitutional courts are, like Indonesia's, permitted only to test the constitutionality of statutes. This is a significant restriction, particularly in the Indonesian context, because the bulk of Indonesian law is in these lower-level laws. They include government regulations (*peraturan pemerintah*); presidential decisions (*keputusan presiden*), instructions (*instruksi presiden*) and regulations (*peraturan presiden*); ministerial regulations (*peraturan menteri*) and decisions (*keputusan menteri*); and laws enacted by local government legislatures and executives, called *Perda* (*peraturan daerah*).[1] Only the Supreme Court has jurisdiction to review these laws, but it cannot do so against the Constitution. Rather, the Supreme Court has jurisdiction only to review these national regulations and regional laws for compliance with national statutes.[2] There is, therefore, no mechanism to judicially review the constitutionality of these lower-level laws (Butt and Parsons, 2014).

This is a highly problematic gap in Indonesia's judicial review framework. The need for effective review of lower-level laws is arguably more acute than for statutes: most are issued without the relatively transparent debates that accompany a statute's passage in the national legislature. Failure to grant power to any Indonesian court to review regional laws as against the Constitution, and to ensure their consistency with higher-level laws, is a particularly significant omission. In the post-Soeharto regional autonomy drive, hundreds of subnational governments were granted expanded powers to regulate any matter not reserved exclusively for the central government: foreign affairs, defence, security, judicial affairs, national monetary and fiscal matters, and religion.[3] As currently configured, however, the legal framework for regional autonomy provides significant scope for jurisdictional overlaps between tiers of government. The central government has retained jurisdiction to regulate any matter over which regional governments also have jurisdiction.[4] Further, the subnational governments – of which there are well

1 The formal hierarchy of these laws is contained in Article 7(1) of the 2011 Lawmaking Law. This hierarchy is influenced by the ideas of Hans Kelsen, who famously argued that legal systems were structured as a system of norms, each 'based on' a norm of higher authority and, ultimately, the grundnorm – the basic norm, order, or rule that forms an underlying basis for a legal system (Kelsen, 1961).

2 Article 24A(1) of the Constitution; Article 11(2)(b) of the 2009 Judicial Power Law; Article 31(2) of the 1985 Supreme Court Law.

3 Article 18(5) of the Constitution; Article 10(3) of the 2004 Regional Government Law.

4 Article 10(5) of the 2004 Regional Government Law.

over 500, each with a legislature and executive – which are empowered by the regional autonomy laws have largely overlapping jurisdictions (Butt and Lindsey, 2012). The result is substantial bodies of inconsistent laws produced by various tiers of government.

The Constitutional Court has accepted that its judicial review powers are limited in this way, turning down constitutional challenges to lower-level laws including ministerial decisions. The Court has also refused to review MPR Decrees, which have a formal status above statutes (Sahbani, 2014b). As we shall see in Chapter 6, however, the Court has, in rare circumstances, effectively circumvented this constitutional jurisdictional limitation to review other types of laws such as government regulations. This it has done by issuing declarations of 'conditional constitutionality' and 'conditional unconstitutionality'.

1.2 *The Court as 'Negative Legislator'*

The Court often emphasises that it is a 'negative legislator', not a 'positive legislator' – a Kelsenian distinction also maintained, at least in theory, by many of the world's constitutional courts (Brewer-Carias, 2013).[5] The Court cannot make 'editorial' additions or reforms to statutes when reviewing them because this is the DPR's task. Rather, the Constitution authorises the Court to invalidate only norms, provisions or statutes that are unconstitutional, much like a legislature when it repeals a statute (Ferreres-Comella, 2009, p. 9). Adding norms usurps the function of the legislature, thereby undermining the separation of powers.

Comments made by the Court in the *Religious Courts* (2008), *Blasphemy Law* (2009) and *DPD Domicile* (2008) cases illustrate the distinction between these 'negative' and 'positive' legislative functions. The applicant in the *Religious Courts case* (2008) was a young Muslim who challenged Article 49(1) of the 1989 Religious Courts Law. This Article exhaustively lists the jurisdiction of the religious courts as cases between Muslims concerning: marriage (*perkawinan*), succession (*waris*), gifts (*hibah*), bequests (*wakaf*), payment of alms (*zakat*), charitable gifts (*infaq*), gifts to the needy (*shadaqah*) and the Islamic economy (*ekonomi syari'ah*). The applicant pointed out that important areas of Islamic law – such as criminal law and its punishments, including hand amputation for theft and stoning for adultery – were not included in Article 49(1). Yet Islam required him to follow the entire corpus of Islamic law. He argued that, by not providing mechanisms for applying and enforcing all areas of Islamic law

5 Though many constitutional courts have found maintaining this distinction more difficult as they attempt to more actively protect constitutional rights (Stone Sweet, 2012, pp. 819, 828).

against Muslims, the state had breached his various religion-related constitutional rights, including freedom of religion.[6] He asked the Court to expand the jurisdiction of the religious courts in Article 49(1). The Court refused this request, declaring that:

> The Court does not have jurisdiction to add to the exclusive jurisdiction of the Religious Court as set out in Article 49(1) of the Religious Court Law because, based on Article 24C of the Constitution and Article 10 of the Constitutional Court Law, the Court has jurisdiction to review the constitutionality of statutes and to declare them to be not legally binding if it is proved that the statute conflicts with the Constitution…The Court can only act as a negative legislature and has no authority whatsoever to add to the contents of a regulation or to be a positive legislator.[7]
>
> *Religious Courts case* 2008, para [3.16]

In the *Blasphemy Law case* (2009), discussed again in Chapter 5, the Court responded to several witnesses who, during proceedings, had urged the Court to amend the 1965 Blasphemy Law to clarify the circumstances in which the government could apply its more repressive provisions. The Court stated:

> the Court does not have jurisdiction to make any editorial and content changes, but can only declare [the statute] constitutional or unconstitutional…[A]mending it so that it becomes perfect falls within the jurisdiction of lawmakers, through the normal legislative process.
>
> *Blasphemy Law case*, 2009, pp. 304–305

Similarly, in the *DPD Domicile case* (2008), the Court was asked to review the constitutionality of provisions of the 2008 General Elections Law that imposed prerequisites for DPD candidature. According to the applicants, the Constitution required that DPD candidates be domiciled in the province in which they stood for election and that they not be nominated by a political party. They asked the Court to add these requirements to the impugned provisions. The minority decided that the Court could not meet this request because it was not a legislative body. Requests to change statutory provisions were better addressed to the legislature, rather than the Court.

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6 See Articles 29(2), 28E(1), 28E(2) and 28I(1) of the Constitution.

7 The applicant also asked the court to revoke Article 49(1). The Court rejected this request, pointing out that this would remove entirely the legal basis for the religious courts exercising any jurisdiction, including the family and Islamic economic law matters it could adjudicate.

Despite the Court stating that it cannot add norms to legislation, and its regular refusal to do so, the Court has often done precisely the opposite. This it has achieved primarily by issuing declarations of conditional constitutionality, discussed in Chapter 6. As we shall see, in these cases the Court declares a statute to be constitutional provided that it is interpreted in a particular way, or unconstitutional unless interpreted in a particular way that the Court deems to be constitutional. The majority did just this in the *DPD Domicile case* (2008), holding that the impugned provisions were conditionally constitutional provided that they were 'given the meaning to contain' the requirement that DPD candidates be domiciled in the province where they stand for election.[8] This seems tantamount to adding the domicile requirement to the statutory prerequisites for DPD candidacy.

2 Legislative Latitude

The Court has, in many decisions, declared that, in principle, the legislature has broad discretion to enact legislation within the confines of the Constitution. So, if the Constitution gives the national parliament power to enact a statute to further regulate a particular issue, then the Court will often give the legislature free rein over the content of that statute provided, of course, that the statute otherwise complies with the Constitution. As the Court stated in a passage reproduced in several judgments:

> The Court, when performing its function as the guardian of the Constitution, cannot nullify a statute or a part of it, if the norm [in question] constitutes an open delegation of authority which can be determined as legal policy by lawmakers. Even if the contents of a statute are considered bad…the Court is not able to nullify them. Bad does not necessarily mean unconstitutional, except if the legal policy produced by lawmakers intolerably breaches morality and rationality and is unjust. This view is in line with Constitutional Court Decision 010/PUU-III/2005, in which it was declared that, provided that a policy choice does not exceed the jurisdiction of lawmakers, there will be neither misuse of authority nor conflict with the Constitution, and the choice cannot be invalidated by the Court.
>
> *Saurip Kadi case*, 2008, para [3.17]

8 The Court did not, however, require that candidates be entirely independent of political parties, as the applicants had requested.

Likewise, if the Constitution requires the legislature or executive to achieve a particular end but does not specify the means, then the Court will not evaluate the means the legislature chooses to achieve that end, nor the effectiveness of those means, unless those means breach the Constitution. In other words, the Court has declared that it will not, as a general rule, second-guess the correctness or effectiveness of government policies unless they are unconstitutional. This is because:

> …In a democratic country in which the people are represented through elections, it is presumed that the people's will is represented by people's representative institutions.
>
> *KPK Law case*, 2003, p. 95

The Court's approach in these cases appears similar to the so-called 'presumption of constitutionality' employed by courts exercising constitutional jurisdiction in other countries. This presumption holds that if the statute under review is open to multiple interpretations, the Court should give it the benefit of any doubt and prefer an interpretation that is consistent with the Constitution. The Court should invalidate only if the statute contains a mistake 'so clear that it is not open to rational question' (Sadurski, 2005, pp. 99–100, citing Thayer, 1893). However, the Court appears to have eschewed this presumption in favour of evaluating the efficacy of government policy in several cases, discussed in Chapter 6.

2.1 KPK Law Case (*2003*)

An early case illustrating the 'corridor of constitutionality' concept is the *KPK Law case* (2003). Here, the applicants – the Public Official's Asset Investigation Commission (*Komisi Pemeriksa Kekayaan Penyelenggara Negara*, or KPKPN) and 32 of its members – sought a review of the 2002 KPK Law, which established the KPK. One of the Law's purposes was to subsume the pre-existing KPKPN into the KPK's structure. The applicants argued that the 'merger' was unconstitutional, primarily because the KPKPN had been effective and they feared that becoming part of the KPK might reduce its effectiveness.

A majority of the Constitutional Court appeared to accept that the state had an obligation to eradicate corruption from public life, or at least to sincerely attempt to eradicate it. The majority appeared to derive this obligation from the Preamble of the Constitution, even though it contains no mention of corruption. According to the majority:

> The peoples' aspirations…for protection for the nation and for social justice for all Indonesians, as is promised in the Preamble to the Constitution,

> demands the eradication of corruption and a state administration free of corruption, collusion and nepotism.
>
> *KPK Law case*, 2003, p. 117

The majority held that the Law did not violate the Preamble, accepting that the Law was in fact part of a government drive to eradicate corruption. The majority disagreed that the Law was inadequate because it regulated only corruption prevention, not eradication, but indicated that even if the Law were inadequate the Court could not simply invalidate it (*KPK Law case*, 2003, pp. 100–101). According to the Court, the government could choose the means to meet its obligations from a variety of alternatives, even if the alternative chosen was not effective (*KPK Law case*, 2003, pp. 100–101). Only if the choice violated the Constitution would the Court intervene (*KPK Law case*, 2003, p. 102).[9] Presumably, the majority would have invalidated the Law if its effects on the 'fight against corruption' were so deleterious that it fell short of the government's obligations under the Preamble. To speculate, this might have occurred had the Law disbanded the KPKPN without replacing it.

2.2 *Opened Legal Policy*

In its earlier cases the Court described the latitude given to lawmakers as the 'corridor of constitutionality'. The Court now prefers to describe it as 'opened [sic] legal policy'. As the Court often puts it, a statute will not be unconstitutional provided that its content falls within the 'opened legal policy' permitted under the Constitution.

For example, in the *Capital City of Jakarta case* (2012), the applicants challenged the procedures by which the Governor and Deputy Governor of Jakarta were elected. To win in a first round, a candidate pair needed 50% of the vote. If no candidate pair met this threshold, then a second-round vote would be held. By contrast, in other provinces, if no candidate pair obtained 50% in the first round, then the pair obtaining more votes than any other pair would win, provided that it obtained at least 30% of the vote;[10] only if no candidates received 30% of the vote would there be a second-round poll. For the Court, Jakarta was a 'special' province, being the capital city of Indonesia, and these Jakarta-only procedures were therefore justifiable. These gubernatorial

9 Justice Soedarsono dissented, stating that he would have invalidated the Law. He appeared to interpret the Preamble as requiring the government not to detract from any successful advances it had made in combatting corruption (*KPK Law case*, 2003, p. 125).

10 Articles 107(1) and (2) of 2008 Amendments to the 2004 Regional Government Law.

election procedures were 'opened legal policy' that did not violate the Constitution (*Capital City of Jakarta case*, 2012, para [3.18.3]).

The Court reached a similar decision in the *National-scope Party Requirement case* (2012). This was a challenge to the constitutionality of requiring political parties to have minimum levels of support at the national, provincial, county or city, sub-district and village levels (Articles 17 and 18 of the 2011 Political Parties Law). This precluded a party from contesting elections in only one province or city unless it was represented across Indonesia.[11] The applicants argued that preventing local parties being established violated various constitutional rights.

For the Court, however, Article 18 of the Constitution, which provides the basis for regional autonomy, did not expressly require that local political parties participate in or exercise that autonomy. In any event, local parties were not strictly necessary for the functioning of regional autonomy because national parties could adequately channel regional aspirations. The national legislature could thus choose either to permit local parties or impose the national representation requirement. For the Court, this was a

> legislative choice/policy which is open or a policy that falls within the constitutional corridor (optional constitutional [sic]), made to accord with the conditions and situation faced by the state, and observing the principle of the National Unity of the Republic of Indonesia, as provided in Articles 1(2) and 37(5) of the Constitution.
>
> *National-scope Party Requirement case*, 2012, para [3.13]

2.3 *Article 28J(2) and Proportionality*

The Court has given significant leeway to the legislature by allowing legislation that breaches the constitutional rights of applicants to remain in force where that legislation protects the rights of other people and serves a specified purpose. This the Court does by reference to Article 28J(2) of the Constitution, which states:

> In exercising their rights and freedoms, every person must submit to limitations stipulated by statute with the sole intent of protecting the rights and freedoms of others and which accords with moral considerations, religious values, security and public order in a democratic society.[12]

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11 Except for Aceh. See 2006 Aceh Governance Law.

12 For further discussion on the Court's use of Article 28J(2), see Butt and Lindsey (2012). This appears to be a rough translation of Article 29(2) of the Universal Declaration of

Even though the Court has indicated that Article 28J(2) should be applied strictly – that is, it should be used to limit human rights only in 'highly exceptional circumstances' (*Police and Army Voting case*, 2004, p. 25) – the Court has refused to invalidate many statutes by reference to it. The Court has, for example, upheld the constitutionality of provisions of the Criminal Code[13] and the 2008 Information and Electronic Transactions Law that provide criminal penalties for defamation. According to the Court, these provisions limit the constitutional freedoms of speech and expression, but they are permissible because they protect the constitutional rights to honour and reputation (Article 28G).[14]

Another example of the Court applying Article 28J(2) is the *Pornography Law case* (2009). Here, the Court upheld provisions of the 2008 Pornography Law which banned producing, reproducing and distributing a wide range of 'offensive' material, conservatively defined (Lindsey, 2012). The Court held that the 2008 Pornography Law legitimately restricted the constitutional freedoms of speech and expression because it sought to protect Indonesia-wide community 'values of propriety' (*nilai-nilai kesusilaan*) (*Pornography Law case*, 2009, p. 387).[15]

Courts around the world are, of course, required to balance rights and interests against each other in constitutional review cases. Many do so by applying 'proportionality' tests.[16] However, the Indonesian Constitutional Court appears to have gone further than courts in other countries with enforceable bills of rights, allowing legislation that limits or even ignores constitutional rights that

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Human Rights, adding religious values and security, and removing general welfare. Article 29(2) states: In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

13 *Kitab Undang-undang Hukum Pidana* or KUHAP.

14 See, for example, the *Wijaya and Lubis* (2008); *Piliang* (2008); and *Bloggers'* (2009) cases.

15 Problematically, however, the Court has rarely identified the rights of others and specific interests or purposes as Article 28J(2) appears to require. For example, in the *Pornography Law case* (2009), the Court identified neither the 'human rights of others' that needed to be balanced against freedom of expression, nor any purposes or interests mentioned in Article 28J(2).

16 See, for example, Tsakyrakis (2009). By contrast, the Indonesian Constitutional Court rarely refers to the balancing exercise that Article 28J(2) appears to require in terms of proportionality. Despite extensive searching, I know of only one case in which the Court has mentioned the concept of 'proportionality': the *Natakusumah case* (2009). There, a majority of the Court stated that the limitation or restriction on a particular human right must be proportional to the objective or other interests protected by the statute.

are expressly non-derogable. Article 28I(1) of the Constitution contains a list of such rights:

> The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognised as an individual before the law, and the right not to be prosecuted under a law of retrospective application are human rights that cannot be limited under any circumstances.

Article 28I(1) indicates that the Constitution's drafters intended that the rights mentioned be considered 'absolute' – they must not be compromised, even if they clash with the human rights of others. This appears to be the only conclusion that can be drawn from the words 'cannot be limited under any circumstances' at the end of the provision. Yet in several cases, a majority of the Court has applied Article 28J(2) to allow the legislature to limit or ignore Article 28I(1) rights. It has, for example, allowed the freedom from prosecution under a law of retrospective application and the right to life to be overridden by other rights and interests.[17] In other words, the Court has allowed legislation that breaches important constitutional rights to stand, even though Article 28J(2) does not appear applicable.

The Court's decisions involving Article 28I(1) rights are rarely unanimous, with the dissenting judges usually arguing that Article 28I(1) rights are not subject to Article 28J(2). As Justice Achmad Roestandi wrote in dissent in the *Soares case* (2004, pp. 63–64):

> On the basis of Article 28J, all human rights can be limited for certain reasons, except for the human rights mentioned in Article 28I. Once again, it must be read like this, because if Article 28J's restrictions intrude upon the seven human rights contained in Article 28I, then there would be no difference between the seven human rights [in Article 28I] and other human rights. If this were so, then why are the seven human rights regulated specially in Article 28I. In other words, why was Article 28I enacted?…[T]he words 'cannot be diminished in any circumstance' are plain and clear words, or, borrowing from the *fiqih* [Islamic jurisprudence], are *qoth'i* [convincing and certain]. To discover the true intent of the drafters of the Constitution, words can be interpreted by using the authentic, grammatical, historical, teleological and other interpretation methods. Legal construction is permitted using the analogy, *argumentum*

17 See, for example, the *Firing Squad* (2008); *Death Penalty* (2007); *Soares* (2004) cases.

> *a contrario* or legal refinement methods to expand the meaning of those words. However, [this process of] interpretation must not allow something that is clearly not permitted to be permitted or something that is clearly negative to become positive. An analysis such as this can no longer be classified as interpretation or developing legal construction, but is more like juggling. Therefore, the seven human rights contained in Article 28I are absolute…

3 Constraints Imposed by the 2003 Constitutional Court Law

The Court has strongly opposed attempts by lawmakers to subject it to external scrutiny. It has also resisted interference in its jurisdiction and decision-making practices, and the processes by which its judges are appointed and investigated for alleged impropriety. To do this, the Court has needed only to wait for a constitutional challenge to be brought to its governing law – the 2003 Constitutional Court Law, amended in 2011 and 2013. The Court has then simply invalidated provisions that, in its view, prevent it from performing its functions as specified in the Constitution or potentially undermine its independence, sometimes even when applicants have not asked it to review them.

The Court has issued these types of decisions three times. First, in several early cases, the Court reviewed Article 50 of the 2003 Constitutional Court Law, which sought to restrict the Court to reviewing statutes enacted after 1999. Second, the Court reviewed many of the 2011 Amendments to the 2003 Constitutional Court Law, passed by the DPR to strengthen the prerequisites for serving as a Constitutional Court judge and the processes for investigating and disciplining errant judges, and to prevent the Court from issuing decisions that exceeded its constitutionally-delineated jurisdiction. The Court did this in two cases which are discussed in Chapter 6: the *MK Law Amendment cases No 1 and 2* (2011). Third, in 2013, the Court reviewed, in the *MK Perpu case* (2014), the 2013 Interim Emergency Law, issued by then-President Susilo Bambang Yudhoyono in response to the Akil Mochtar corruption scandal. This Law also sought to tighten the appointment prerequisites and the nomination process for becoming a Constitutional Court judge, and to change how the Court handles allegations of judicial misconduct.

The Court's invalidations in these cases drew sustained criticism from legal commentators and the press, primarily because the Court had decided upon its own interests. Before discussing the Article 50 cases and the *MK Perpu case*

(2014), I consider some of the justifications the Court has provided in defence of ruling on the constitutionality of its own governing laws.

3.1 *Ruling on the Court's Own Interests*

Perhaps the most famous early example of the Court ruling in favour of its own interests is the *Supreme Court v Judicial Commission case*, decided in August 2006. The relationship between the Supreme Court and the Judicial Commission has been fractious, primarily because the Supreme Court dislikes an external body scrutinising its performance and participating in appointing its justices. Both are functions of the Judicial Commission (Colbran, 2009). From late 2005, tensions escalated after then-serving Supreme Court Chief Justice, Bagir Manan, and other Supreme Court judges, refused to attend the Judicial Commission's offices to respond to corruption allegations. A list of 'problematic' Supreme Court judges was then leaked to the media, presumably by the Judicial Commission. In response, several Supreme Court judges named on the list reported the Judicial Commission to the police, alleging defamation (Butt, 2007b, p. 187).

Thirty-one Supreme Court judges also approached the Constitutional Court, challenging the constitutionality of provisions of the 2004 Judicial Commission Law that authorised the Commission to supervise Supreme Court judges by analysing their decisions to detect errors or indications of impropriety. One argument the judges made was that this supervision contradicted the judicial independence guarantee in Chapter IX of the Constitution (Butt and Lindsey 2012: 96). The Constitutional Court agreed with the Supreme Court, holding that:

> reviewing judicial decisions might place unjustifiable pressure on the judges, thereby breaching judicial independence. Only the courts could review judicial decisions, and then only through the appeals process – not by evaluating and directly interfering with decisions or by influencing judges.
>
> BUTT, 2007b, p. 192 (references omitted)

However, before considering the legal arguments presented by each side, the Court raised what appeared to be a question unrelated to the application: whether the Judicial Commission could also supervise the *Constitutional Court*. The Court held that it could not, providing several reasons, most of which were not convincing. As I have written elsewhere:

> The Constitutional Court's strongest argument for excluding itself from Judicial Commission supervision appears to have been that this might

> compromise the court's ability to impartially adjudicate disputes between state institutions – particularly if the Judicial Commission was one of the parties to the dispute, as in this case. The court noted that if the Judicial Commission could supervise the Constitutional Court, then the latter's credibility and legitimacy to adjudicate a case involving the Judicial Commission would be questionable. It argued that the independence of the Constitutional Court might be compromised, either in fact or in perception, if a decision against the Judicial Commission resulted in an adverse evaluation by the commission.
>
> BUTT, 2007b, pp. 189–190 (references omitted)

The Court provided its most comprehensive attempt to justify reviewing the constitutionality of its own governing law in the *MK Law Amendment case No 2* (2011) – relying primarily on grounds of necessity. The Constitution had nominated the Court as its final interpreter – no other body could adjudicate a challenge to the Court's own governing Law. Also, neither the Constitution, nor the 2003 Constitutional Court Law, expressly prohibited the Court from reviewing its own governing statute. Further, the issue affected the 'constitutional interests of the nation and the state', not just those of the Constitutional Court and its judges. For these reasons, the Court decided that it needed to be able to review the 2003 Constitutional Court Law. This conclusion was strengthened by Indonesia's umbrella judiciary law – the 2009 Judicial Power Law – which prohibited judges from refusing to decide cases because the applicable law was not clear. In any event, the Court assured, when handling cases involving its own interests, it would 'remain impartial and independent' (*MK Law Amendment case No 2*, 2011, pp. 62–63).

In the *MK Perpu case* (2014, p. 97), the majority added:

> If the Court is prohibited from reviewing the statute governing the Court, then the Court will be an easy target for paralysis by a statute enacted to further the interests of [political power], in which the position of the President is strongly supported by the DPR or vice versa.

In dissent in the *MK Law Amendment case No 2* (2011), Justice Harjono discussed concerns about the Constitutional Court deciding cases involving its own interests. For him, the Court could rule on cases involving threats to judicial independence, including its own, because Article 24 of the Constitution requires that the Constitutional Court, and other courts, be independent. The Court could also clarify provisions relating to itself that were poorly drafted and thus unclear. In such cases, the Court could issue a conditionally

constitutional decision, imposing preconditions to 'correct' the provision (*MK Law Amendment case No 2*, 2011, p. 84).

However, reviewing the constitutionality of statutory provisions that had a 'direct connection with the interests of its judges', as opposed to those of the institution (*MK Law Amendment case No 2*, 2011, p. 84), required greater caution. Justice Harjono asserted, with little explanation, that some of the 2011 Amendments – including those tightening the prerequisites for appointment to the Court – affected the personal interests of judges. Justice Harjono said that the Court should exercise judicial restraint and avoid invalidating provisions with this subject matter. This would maintain the Court's image and show respect to the legislature (*MK Law Amendment case No 2*, 2011, p. 84).

Justice Harjono did not clearly identify the interests of the Constitutional Court as an institution and the personal interests of its judges. But presumably he feared some Constitutional Court judges being tempted to invalidate prerequisites that would have excluded them from serving on the Court, perhaps even requiring them to resign.[18] By contrast, for Justice Harjono, judges obtained 'no benefit' from the Article 50 cases. It is these cases to which I now turn.

3.2 *Article 50 Cases*

Prime examples of the Court guarding its jurisdiction from legislative interference are found in a series of cases from 2004. The cases involved Article 50 of the 2003 Constitutional Court Law and its Elucidation, which restricted the Constitutional Court to reviewing statutes enacted after the first amendment to the Constitution on 19 October 1999.[19] Article 50 was highly significant, impeding judicial scrutiny of the large body of statutes, many of which were repressive, enacted during Soeharto's authoritarian rule. These were arguably in much greater need of review for compliance with Indonesia's Bill of Rights than the legislation produced by post-Soeharto parliaments, whose members were democratically elected.

Whether the Court should be permitted to review statutes enacted before the Constitution was amended had been a hotly debated issue in the

18 This would have been an unlikely result, however, given that the Court's decisions operate prospectively, as discussed in Chapter 5.

19 Article 50 states: "Statutes for which a review can be sought are statutes enacted after the amendment of the Constitution." The Elucidation states: 'After the amendment of the Constitution' means the First Amendment to the Constitution on 19 October 1999. Other countries have imposed similar restrictions on their constitutional courts (Ferreres-Comella, 2009, p. 6).

parliamentary committee in charge of drafting the 2003 Constitutional Court Law. The predominant view, supported by the government (Asshiddiqie, 2008, p. 91), was that allowing the review of laws enacted before the Court itself existed was 'inappropriate' and would swamp the Court with judicial review applications. During these debates, the PDI-P faction staunchly opposed such a restriction (DPR, 2003, p. 127), with some of its delegates arguing with great prescience that the Court might even invalidate Article 50 for breaching the Constitution.[20]

In several of the Court's early cases, applicants challenged statutes enacted well before 1999. In the first two of these cases, heard in 2003, the applicants did not specifically petition the Court to review Article 50, but this did not prevent a six-judge-to-three majority from continuing to review the impugned statute. The majority was content to 'set aside' (*mengesampingkan*) Article 50 so that it could hear the merits of the review (*MA Law case*, 2003; *Regional Land Affairs case*, 2003).

It was not until the *Chamber of Industry case* (2004) that the same majority invalidated Article 50. The nub of the Court's reasoning was that the Constitution does not confine the Court to reviewing statutes passed after the first amendment. Parliament could not by statute 'reduce' the Constitutional Court's constitutionally-delineated jurisdiction. According to the majority, 'If there was intent to limit the Constitutional Court's jurisdiction, this should have been contained in the Constitution itself, not a lower-level law' (*Chamber of Industry case*, 2004, p. 54). The Court also feared that allowing Article 50 to remain would lead to double standards – one for legislation passed before the first amendment (which would be unreviewable) and another for legislation passed after the first amendment (which would be reviewable).[21]

3.3 MK Perpu Case (*2014*)

In late 2013 President Susilo Bambang Yudhoyono issued the 2013 Interim Emergency Law, which amended the 2003 Constitutional Court Law. The

20 PDI-P delegates even predicted the grounds upon which the Court ultimately invalidated Article 50 (DPR, 2003, pp. 203–204).

21 By contrast, the minority argued that Article 24C(6) of the Constitution gave parliament power to legislate 'The appointment and dismissal of Constitutional Court judges, procedural law, and [other matters relating to] the Constitutional Court'. Article 50 of the Constitutional Court Law was contained in a Chapter of the statute entitled 'Procedural Law'. According to the minority, Article 50 merely imposed a procedural limitation on the Court rather than a jurisdictional one (*Chamber of Industry case*, 2004, p. 65).

amendments were directed at three perceived defects in the 2003 Law exposed by the Akil Mochtar corruption case.

First, the Emergency Law established a permanent Constitutional Court Judge Honour Council (*Majelis Kehormatan Hakim Konstitusi*) to investigate allegations of misconduct by Constitutional Court judges. Though a similar Council already existed, it was an ad hoc body and its composition, structure and procedures were regulated by the Constitutional Court alone. As mentioned in Chapter 3, the Emergency Law required the Court to regulate these issues together with the Judicial Commission (Article 27A(13)). The second defect related to Constitutional Court judges being members of political parties. According to the 2003 Constitutional Court Law, judges needed to relinquish party membership before taking office; they could, therefore, remain a party member until immediately before their judicial appointment. Article 15(2)(i) of the 2013 Interim Emergency Law required Constitutional Court judges to relinquish political party membership at least seven years before serving on the Court. The third defect was the process for nominating Constitutional Court judges. Articles 18A, 18B and 18C of the Emergency Law required all nominees to undergo a fit and proper test run by an Expert Panel.

As mentioned, the Court invalidated the entire Perpu. What follows is an analysis of the Court's reasoning.

3.3.1 Judicial Commission and the Honour Council

Predictably, the Court found constitutional fault with the Judicial Commission helping supervise the Constitutional Court. The Court pointed to its *Supreme Court v Judicial Commission* (2006, p. 111) decision, which held that the Judicial Commission was not a 'supervisor institution for the Constitutional Court, let alone an institution with power to assess whether the Constitutional Court's decisions are correct or not'. The Court continued:

> In the practice of the negara hukum, nowhere is the truth or otherwise of a judicial decision able to be assessed by another state institution, let alone a commission. Excessive and inappropriate commentary about the exercise of judicial power in dispute settlement that could lead to widespread public distrust is even considered contempt of court in many countries.
>
> *Supreme Court v Judicial Commission case*, 2006, pp. 111–112

The Court pointed out, referring to Article 10 of the European Convention on Human Rights, that even in the most strongly liberal democratic countries, such as European states, the right to freedom of expression can be interfered

with 'to maintain the authority and impartiality of the judiciary' (*Supreme Court v Judicial Commission case*, 2006, p. 112).

The Court recognised that the Judicial Commission's influence over the Constitutional Court Honour Council was indirect. Indeed, the 2013 Interim Emergency Law did not require that a Judicial Commission member sit on the Council, but rather merely that the Constitutional Court and Judicial Commission issue a joint regulation to govern the Council. The Court appeared concerned that the Emergency Law's real intent was ensuring that the Judicial Commission alone would ultimately regulate the Panel and the Council. Article 87B of the Emergency Law stated that 'all implementing regulations' required under the Emergency Law are to 'be stipulated within three months of the enactment of the Emergency Law'. Article 87(3) stated that until these implementing regulations were issued, the Expert Panel and Honour Council would be established by the Judicial Commission. The three-month deadline had passed and no government regulations had been issued. For the Court, because the deadline had passed, the delegation of regulatory authority had expired. This meant that the Judicial Commission would, by default, continue to hold regulatory power over the Panel and Council, thereby violating the Court's independence.

3.3.2 Political Party Requirement

As for Article 15(2)(i) – which prohibited members of political parties from appointment to the Court within seven years of relinquishing their membership – the Court emphasised that the prohibition was adopted after Akil Mochtar was arrested. He had, of course, been a member of the Golkar political party until mid-2009 when he joined the Constitutional Court. After his arrest, many suspected that Golkar members had used the party's previous affiliation with him to 'access' him, enabling them to bribe him to fix outcomes in electoral disputes involving Golkar-backed candidates (Setuningsih and Amelia, 2014). In this context, it was

> difficult to escape the impression that [Article 15(2)(i)] is grounded in the fact that Akil Mochtar was originally a politician or member of the DPR before becoming a judge of the Constitutional Court.
>
> *MK Perpu case*, 2014, para [3.23]

The Court held that Article 15(2)(i) breached Articles 24C(3), 28D(1) and (3), and 28E(3) of the Constitution, which prohibited discrimination and entitled citizens to participate in government, including by becoming a Constitutional Court judge. Though these rights could be limited under

Article 28J(2) of the Constitution, the reasons for doing so needed to be 'strong and valid'. The Court decided that Article 15(2)(i) met neither condition, citing three main reasons.

First, because Article 15(2)(i) was introduced in response to the Mochtar saga, it was based on a what the Court called a 'stigma' that had emerged within the community. This stigma, or erroneous presumption, was that all politicians were 'inappropriate' to serve as Constitutional Court judges. The Court mentioned that it had already invalidated legislation motivated by a political stigma in the *PKI case* (2003), discussed in Chapter 8. There, the Court removed a prohibition on members of proscribed organisations from standing for national parliament, partly because the prohibition constituted 'political punishment for a particular group'. The *PKI* decision applied to the present case because Article 15(2)(i), too, had emerged out of a 'political stigma'.

Second, the system for appointing judges to the Constitutional Court, which allowed the DPR, president and Supreme Court to choose three judges each, ensured that the Court's bench comprised people with varied backgrounds. While eradicating corruption was critically important, treating all members of political parties as 'corruption candidates' was unjust, as was precluding them from appointment to the Court.

Finally, Article 15(2)(i)'s focus on political party members was misplaced, because a nominee could serve the interests of a political party without being a member of that party. (In any event, it would be easy to falsify party records to remove a person from formal membership to enable their nomination.) For the Court, the apparent intent of Article 15(2)(i) would have been clearer if directed towards members of political parties who had served in the DPR.

Judicial Commissioner Imam Anshori Saleh described this decision as a 'tragedy for law enforcement', fearing that very little prevented 'a new Akil Mochtar' from emerging (Hukumonline, 2014c). However, in my view, this part of the Court's decision is persuasive. One need not be a member of a political party to be loyal to that party. Also, while political connections might make initial contact with a judge easier, parties with no political connections to a particular judge may still find another way to approach that judge. And judges willing to take bribes to fix the outcome of cases are unlikely to limit themselves to parties with which they have been previously associated.

3.3.3 Nomination Process

The Constitutional Court also invalidated Articles 18A, 18B and 18C of the 2013 Interim Emergency Law for violating Article 24C(3) of the Constitution, which states that the President, DPR and Supreme Court may 'put forward' three Constitutional Court judges each. The Court decided that the Constitution

gave the DPR, Supreme Court and President absolute discretion (*kewenangan atributif yang bersifat mutlak*) to choose their judges. For the Court, this was:

> 'full' authority, upon which requirements could not be imposed by statute so that other state institutions are involved [in the process even though they] were not given jurisdiction [over the nomination process] by the Constitution.
>
> *MK Perpu case*, 2014, p. 108

In particular, the Constitution did not authorise the Judicial Commission to participate in the nomination process. By establishing an Expert Panel, which included four Judicial Commissioners, but only one representative chosen by each nominating institution, the Emergency Law had 'reduced the constitutional authority of the Supreme Court, DPR and President' (*MK Perpu case*, 2014, p. 108). For the Court, this was like requiring the Regional Representative Council (DPD) to submit legislative proposals to a panel of experts before forwarding them to the DPR, or requiring the Judicial Commission to subject their recommendations for Supreme Court appointments to scrutiny by a panel before putting them to the Supreme Court (*MK Perpu case*, 2014, p. 108). The Supreme Court, DPR and President could, if they wished, establish their own internal committees to vet nominees (*MK Perpu case*, 2014, pp. 108–109).

Further, the Court appeared concerned that the Expert Panel process undermined the philosophy of the three-way appointment process. The Panel would, through the fit and proper test mechanism, choose candidates they favoured, which might lead to 'popularism', or judges with similar backgrounds being chosen. For the Court, a homogeneous bench was highly undesirable. Having three nominating institutions did not merely divide power between them, but also had a 'more fundamental purpose…that is, to have three groups of Constitutional Court judges with different backgrounds because they are chosen by the three branches of government' (*MK Perpu case*, 2014, p. 109).

Again, this aspect of the Court's decision appears to be constitutionally justifiable. The Constitution does not constrain the power or discretion of the three nominating institutions, so neither should a statute. Indeed, it is arguable that curbing the nominating institutions would upset the balance the 'representative mechanism' seeks to achieve, as discussed in Chapter 3. In any event, a fit and proper test might not weed out any overtly political appointees.

CHAPTER 5

Court-Imposed Constraints

The previous Chapter discussed how the Constitutional Court has ignored or removed limitations upon the exercise of its powers imposed by the legislature, holding that those limitations violate the Constitution itself. Yet, as this Chapter explains, the Court has imposed its own limitations on its jurisdiction and decision-making, even though these limitations are neither expressly nor impliedly required by the Constitution. For example, the Court has refused to exercise its constitutional review powers in some circumstances, including to review the way statutes are implemented. The Court has also not given its decisions retrospective effect. As we shall see, this means that applicants who win cases enjoy few benefits, if any, from the Court's decisions. Nevertheless, the Court has adhered to none of these self-made rules consistently, creating numerous exceptions as it sees fit, often in the name of 'justice'. Unfortunately, this leaves the Court's decisions unpredictable.

1 Review Limited to Norms

The Court has, in many cases, declared that it will review only the norms of statutes, not the way statutes are interpreted or applied in practice. In other words, the Court limits itself to the rather academic exercise of ensuring that the text of the statute under review does not contradict the text of the Constitution. The Court also continually emphasises that it will only consider the constitutionality of norms in the abstract, not their implementation or application in concrete cases – that is, in the particular circumstances of the applicant.[1] As the Court has put it, the Court's decisions apply generally (*erga omnes*), not just to parties involved in the disputes. This means that the Court must consider the interests of other citizens and entities when deciding its cases.[2] I turn now to discuss these issues.

1 For discussion about this concept and constitutional courts whose jurisdiction is enlivened when constitutional questions arise out of actual cases, and whose decisions then apply to those cases ('concrete review'), see Comella (2009, p. 7).

2 See the *Christian Party* (2009) and *Choirul Anam* (2011) cases. Many of the world's constitutional courts take a similar approach, focusing on, as Sadurski (2005, p. 5) puts it, the 'textual

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1.1 *Implementation or Interpretation of Statutes*

On the one hand, the Court's distinction between norms and implementation appears to be a natural consequence of the way the Constitution divides up judicial functions. As mentioned, the Constitution expressly grants the Constitutional Court power to review statutes against the Constitution, not the application of those statutes through government action or regulations. By contrast, the Supreme Court and the courts below it are responsible for ensuring that Indonesia's government and citizens follow the laws that bind them. Disregard or improper application of a statutory norm is thus a matter for those courts. Similarly, if a statute gives discretionary power to an institution of state, then how that power is exercised is not a matter for the Constitutional Court. In the *Land and Building Tax case* (2010), for example, the applicants complained that a particular law was applied to them, but not to others in similar circumstances, and was therefore discriminatory and hence unconstitutional. The Court held that, even if this were true, any discrimination occurred because of how the statute was implemented rather than because of the statute itself.

On the other hand, making the distinction between norms and their application has often left the Court appearing weak and ineffective in the face of government action that appears to be unconstitutional. Maintaining the distinction has, in effect, allowed the state to violate constitutional rights through its actions and regulations, and avoid the violation being treated as a constitutional issue. The government might be held accountable for some form of breach – in the administrative or general courts, for example – but not for violating the Constitution. This is a perverse outcome, given that a primary purpose of a Constitution is to bind the state to its principles.

Perhaps recognising the problems inherent in maintaining this distinction, the Court has in several cases resiled from strict adherence to it. Yet, as the cases to which I now turn demonstrate, the Court has provided no convincing explanations for making exceptions in these cases, but not others.

1.2 Wijaya and Lubis Case (*2008*)

The Court refused to consider the constitutionality of the implementation of a statute in the *Wijaya and Lubis case* (2008). The Court was asked whether defamation provisions in the Criminal Code (*Kitab Undang Undang Hukum Pidana*) breached various constitutional rights, including freedom of speech. The applicants argued that the provisions were misused against citizens merely

dimension of the rule [in abstracto] rather than its operationalisation in application to real people and…legal controversies'.

exercising these constitutional rights (*Wijaya and Lubis case*, 2008, p. 279). However, the Court held that this was an

> argument about the implementation of norms, not about the constitutionality of norms. Weaknesses or inadequacies that occur in…the application of a law [cannot be overcome] by revoking that norm. If this were not so, then every time one were disappointed by the application of a statutory norm…and this was overcome by revoking [it] then the criminal law would have no rationale or place in society.
>
> *Wijaya and Lubis case*, 2008, pp. 279–280

According to the Court, most of the cases the applicants put forward as examples of police misusing the Code's defamation provisions were, essentially, violations of the Code itself. The general courts, not the Constitutional Court, were responsible for adjudicating these.

1.3 Blasphemy Law Case (*2010*)

Another example of the Court's refusal to consider the constitutionality of a statute's implementation is the *Blasphemy Law case* (2010). Dozens of individuals and organisations challenged in the Constitutional Court provisions of the 1965 Blasphemy Law,[3] arguing that they undermined various religion-related constitutional rights.[4] The 1965 Blasphemy Law is short, comprising only four articles and an Elucidation. Article 1 prohibits publicly talking about, advocating, or seeking public support for, an interpretation of a religion or a religious activity that deviates from the basic tenets of a religion practised in Indonesia. According to the Elucidation of Article 1, these religions are Islam, Protestantism, Catholicism, Hinduism, Buddhism and Confucianism. The Elucidation also states that other religions, including Judaism, Zoroastrianism, Shintoism and Taoism, are not illegal and can be practised provided that their adherents otherwise comply with the Blasphemy Law and other laws. Breach of Article 1 by promoting a 'deviant' interpretation of a religion can be met with an official warning, which takes the form of a joint decree of the Religious Affairs Minister, Attorney-General and Internal Affairs Minister (Article 2(1)). If that warning is not heeded, then the government can ban the 'deviant' organisation, school or belief (Article 2(2)).

3 For detailed discussions of this case and the way the Blasphemy Law has been used, including against Indonesian Ahmadis, see Colbran (2010), Freedom House (2010), Crouch (2011a, 2012), and Lindsey (2012).

4 Namely, Articles 29, 28E and 28I(1) of the Constitution.

If that ban is ignored, perpetrators face up to five years' imprisonment (Article 3).

One of the applicants' many arguments was that Article 1 and its Elucidation discriminated against followers of religions not specifically mentioned as ones practised in Indonesia. Even though the 1965 Blasphemy Law declared that these religions were not illegal, they did not receive state recognition or protection as did the religions 'practised in Indonesia'. This, the applicants argued, violated Article 28D(1) of the Constitution ('Every person has the right to legal recognition, guarantees, protection and certainty which is just and equal treatment before the law').

The majority rejected this argument, emphasising that the 1965 Blasphemy Law did not restrict recognition or protection to these six religions. Rather, the opposite was true: the Elucidation to Article 1(3) gave other religions 'full recognition' and 'allowed them to exist' (*dibiarkan adanya*) provided that they did not breach the Blasphemy Law or another law. The majority said that the word 'allowed' (*dibiarkan*) meant 'not impeded or even to be given the right to grow and develop, and not "allowed" in the sense of "ignored"' (*Blasphemy Law case*, 2010, p. 290). Presumably anticipating this finding, the applicants argued that Internal Affairs Ministry Circular Letter 477/74054 of 1978 was evidence of the alleged discrimination because it recognised only Islam, Protestantism, Catholicism, Hinduism and Buddhism as choices for the mandatory religion column on identity cards. The majority held that, even if this Letter was discriminatory, this did not indicate that the Blasphemy Law itself was. It suggested only that the Letter had applied or interpreted the Law in a discriminatory way.[5]

1.4 *Retrospectivity Cases*

The shortcomings of the 'norm only' rule have also been brought into sharp relief where applicants have sought to uphold their constitutional right to be free from prosecution under retrospective laws. Article 28I(1) of the Constitution provides this right, stating that:

> The right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognised as an individual before the law, and the right

5 In any event, the majority noted, the Circular had already been revoked, by Internal Affairs Ministry Circular Letter 477/805/Sj of 31 March 2000 on the Revocation of Internal Affairs Ministry Circular Letter 477/74054 of 1978.

> not to be prosecuted under a law of retrospective application are human rights that cannot be limited under any circumstances.

A statute that is merely *applied* retrospectively – that is, to matters occurring before the statute itself was enacted – will fall outside of the Court's jurisdiction. The Court made this point in a 2004 case, declaring that the retrospective application of a statute is not a

> matter relating to the constitutionality of the Law, but rather a matter relating to the application of the statute, which does not fall within the jurisdiction of the Constitutional Court.
>
> *Manoppo case*, 2004, pp. 73–4

This right is essentially meaningless unless a statute *expressly purports* to permit itself or another law to apply retrospectively. In fact, the statute under review in the *Bali Bombing case* (2003) – Law 16 of 2003 – discussed further below, did just that. Six days after the Bali bombings took place, then-President Megawati Soekarnoputri issued Emergency Law 1 of 2002. This was a new general anti-terrorism law, which contains broad definitions of terrorism, provides substantial penalties for terrorists or those who help or fund them, and introduces procedures designed to facilitate investigating, prosecuting and convicting terrorists. On the same day, President Soekarnoputri also issued Emergency Law 2 of 2002, which authorised using Emergency Law 1 to investigate, prosecute and try those involved in the Bali bombings. The national parliament later endorsed Emergency Law 1 (by enacting Law 15 of 2003) and Emergency Law 2 (through Law 16 of 2003). The Court was able to review Law 16 because it purported to allow Emergency Law 1 to operate retrospectively.

1.5 *Inconsistencies in Court-Imposed Constraints*

Perhaps implicitly recognising that the 'norm only' rule can lead to constitutional rights being ignored in practice, the Court has not consistently followed it. Indeed, the Court has, albeit rarely, specifically declared that it *will*, in some circumstances, assess the constitutionality of the implementation of statutory norms. The *KPK Commissioners* (2011) and *Sisa Suara* (2009) cases provide clear examples of this and are discussed below. These do not sit comfortably alongside the much larger body of decisions just mentioned in which the Court has refused to review how a statute has been applied. The Court has not yet convincingly explained when it will examine the constitutionality of a statute's application. As we shall see, in both decisions the Court held that the statute under review had been applied in a way that appeared to contradict

the plain words of that statute. This caused legal uncertainty which was unconstitutional. Yet the Court has refused to review the interpretation or application of statutes in similar circumstances in other cases.

The Court has also, in effect, extended the reach of some of its decisions beyond statutory norms to their implementation by both government action and regulation, through declaring statutes 'conditionally unconstitutional'. These types of decisions are discussed in Chapter 6.

1.6 Sisa Suara Case (*2009*)

The *Sisa Suara case* (2009) was, to my knowledge, the first in which the Court openly reviewed the implementation or application of a statutory norm rather than the norm itself. The details of this challenge are outlined in Chapter 8. It was brought by several smaller parties against how the General Electoral Commission planned to allocate seats within electoral districts in the 2009 legislative elections under Article 205(4) of the 2008 General Elections Law. The General Election Commission had issued a regulation to implement Article 205(4), outlining the process for 'converting' votes into seats for the 2009 legislative elections. The Supreme Court had invalidated that regulation on grounds that it contradicted the 2008 General Elections Law rather than implemented it (Butt, 2009b).

The Constitutional Court found that Article 205(4) was unclear, allowing it to be interpreted in different ways by various state institutions, including the General Electoral Commission and the Supreme Court. Because Article 205(4) was 'multi-interpretable', it violated the constitutional right to legal certainty (Article 28D(1)).

In reaching this decision, the Court did not obscure the reality that it was reviewing a statute's implementation rather than its norms. The Court acknowledged that the applicants had challenged the application or interpretation of Article 205(4) rather than the norm it contained (*Sisa Suara case*, 2009, p. 87). Recognising this, the Court noted that it would not usually grant political parties standing to challenge the constitutionality of statutes because parties would usually either have participated in deliberating and enacting them, or could simply seek to amend them using the legislative process.[6] However, in this case, the Court recognised that the applicants had no control over how Article 205(4) was interpreted and, therefore, granted them standing. The Court also stated that it ordinarily would have thrown out the case on *ne bis in idem* grounds, given that Article 205(4) had already been challenged in a

6 The Court's jurisprudence on standing for political parties is discussed in more detail in Chapter 3.

previous similar case. However, in the previous case, only the norm was challenged. The present case was, therefore, the first time the Court had reviewed the application of Article 205(4).

Despite being so transparent about reviewing the implementation of a norm, the Court did not refer to the previous cases where it had refused to do this, let alone attempt to justify departing from them.

1.7 KPK Commissioners Case (*2011*)

The Court again reviewed how a norm was applied in the *KPK Commissioners case* (2011). Brought by anti-corruption reformists and non-government organisations, this was a challenge to Article 34 of the 2002 KPK Law. Article 34 states: 'Commissioners of the Anti-corruption Commission [KPK] hold office for four years and can be reappointed for only one term'.

Former KPK Chief Commissioner Antasari Azhar was dismissed in 2009 after being convicted for premeditated murder. He was replaced by Busyro Muqoddas, a well-regarded former academic and Judicial Commission Chairperson.[7] For various political reasons, the government wanted Muqoddas to serve out the remainder of Azhar's term rather than a full four-year term. The applicants argued that this was unconstitutional and that Muqoddas should serve a full term.

The Court sided with the applicants on various grounds. One was the constitutional right to legal certainty provided by Article 28D(1) of the Constitution. As in *Sisa Suara*, the Court held that Article 34 caused legal uncertainty because the government had interpreted it in a way that contradicted its 'clear words'.[8] The Court evaluated the constitutionality of how the government had interpreted Article 34, rather than the substance of Article 34 itself, thereby directly contradicting the previous decisions mentioned above.

However, unlike in *Sisa Suara* (2009), the Court provided some justification for this approach:

> [T]he Court has jurisdiction to review the constitutionality of the interpretation of a statutory norm implemented by the DPR or the President,

7 See Butt (2012a) for a detailed discussion of the Antasari Azhar case and the Constitutional Court cases involving the Anti-corruption Commission in the first decade after its establishment.

8 The Court also invalidated Article 34 because it discriminated against those who were appointed to replace commissioners who had not served their full terms. This was because appointees would serve a shorter term despite undergoing similarly rigorous, time-consuming and costly selection processes.

> if that interpretation threatens the respect, protection and fulfilment of the constitutional rights of citizens, in the context of guaranteeing the implementation of the mandate and norms of the Constitution. By so doing the Court does not exceed its jurisdiction to review statutory norms as against the Constitution…Article 1(2) of the Constitution – which declares that 'Sovereignty is in the hands of the people and is implemented in accordance with the Constitution' – requires that the administration of the state by the organs of the state be based on the Constitution. It is on this basis that Indonesia is a state adhering to constitutional government… Therefore, in performing its tasks and responsibilities as the judicial institution that ensures that constitutional norms are performed in accordance with the spirit of the Constitution, besides reading and understanding the text of the Constitution, the Court must also seek out and discover the values and philosophical foundations contained in the Constitution to decide every issue the Court faces. If the Court discovers the implementation of a statutory norm breaches, diverges from or is inconsistent with the norms and spirit of the Constitution, then by virtue of its function, tasks and jurisdiction to uphold the Constitution, the Court has jurisdiction to review the constitutionality of the interpretation of a statutory norm.
>
> *KPK Commissioners case*, 2011, pp. 72–3

Even though in this passage the Court clearly stated that it can review the interpretation of statutes, in subsequent cases the Court has reverted to refusing to do so.[9] The result is significant uncertainty about whether, in future cases, the Court will review the interpretation of statutory norms, rather than the norms themselves.

2 Prospectivity of Decisions

The Constitutional Court has generally given its decisions prospective operation. That is, if the Court decides that a statutory provision is unconstitutional and declares it invalid, the provision will be invalid only from the time the Court declares it to be so, when reading out its decision in open court. This means that any action taken under a statutory provision is legal and valid until the moment the Court declares the provision invalid. Accordingly, neither the

9 See, for example, the *National Symbols case* (2012, para [3.16]); *Blasphemy Law case* (2012, pp. 146–147); *BPH Migas case* (2012, p. 76).

applicant nor any other citizen or entity who suffers damage under a statutory provision before the Court invalidates that provision, can obtain redress for that damage. An act performed under a statute before the Court invalidates it does not need 'undoing'.

The result is paradoxical: on the one hand, applicants must demonstrate specific or potential constitutional loss to be granted standing. On the other, the 'best' result they can achieve is avoiding having an unconstitutional statutory provision applied against them again or to prevent it being applied to someone else.

The Court has, with few exceptions, maintained this preference since its first reported decision – the *Electricity Law case* (2003). As mentioned, in that case the Court invalidated the 2002 Electricity Law for violating Article 33(2) of the Constitution. However, the Court sought to allay concern about contracts already entered into under the 2002 Electricity Law before its invalidation. Because its decisions only had prospective operation,

> all contracts or permits relating to the electricity industry signed and issued under the Electricity Law remain in force until the contract or permit becomes invalid or expires.
>
> *Electricity Law case*, 2003, p. 350

The Court took a similar approach in the *KPU/Bawaslu Appointments case* (2010). This was a challenge to Articles 93, 94(1)–(2) and 95 of the 2011 Electoral Administration Law, which set out appointment procedures for Election Supervisory Board (*Bawaslu*) members.[10] The Court declared these procedures unconstitutional, but did not also require that the members already appointed under them be removed. This, the Court claimed, would have disrupted preparations for upcoming elections. It also promoted legal certainty (*KPU/Bawaslu Appointments case*, 2010, p. 116).

Prospectively operating decisions can be particularly egregious for applicants in criminal cases. A defendant convicted under a statute later declared constitutionally invalid cannot have the conviction overturned, despite the statute's flaw. This is because the statute will have already been applied against that defendant, to convict him or her, while it was still valid. The Court has maintained this view in many cases, several of which I now discuss.

10 On the KPU and Bawaslu, see Chapter 7.

2.1 Lèse Majesté Case (*2006*)

The *Lèse Majesté case* (2006) provides a clear example of the ramifications of the Court's general refusal to give its decisions retrospective effect.[11] One of the applicants, Eggi Sudjana, a lawyer, was on trial before the Central Jakarta District Court for insulting the president, accused of violating Article 134 of Indonesia's Criminal Code – the so-called *Lèse Majesté* (injured majesty) provision. While visiting the offices of the Anti-corruption Commission, Sudjana had announced to the press that a businessman had given a jaguar motor vehicle to the president as a gift and the president's son was using it. He challenged Article 134. His trial was adjourned while the Constitutional Court considered whether the provision violated the freedom of speech.

The Constitutional Court invalidated Article 134, agreeing that it violated this freedom and observing that the Dutch had used it during their colonisation of Indonesia to suppress criticism of the Dutch monarchy.[12] Yet when his trial resumed before the District Court, the case against him was not thrown out. In the event, he was convicted under Article 134 because he was found to have violated it while it was still in force. His conviction was upheld on appeal to the Jakarta High Court[13] and on cassation to the Supreme Court.[14] The applicant then applied for *peninjauan kembali*. Under this process, applicants can ask the Supreme Court to reopen the decision of any Indonesian court, including one of its own, on grounds such as judicial error or new circumstances that, if known during the original case, might have led to a different decision.[15] One ground Sudjana used in his *peninjauan kembali* application was that the Supreme Court had ignored this Constitutional Court decision. However, the Supreme Court refused to disturb its previous decision and those of the lower courts, holding that they contained no judicial errors. This was because Sudjana performed the act for which he was convicted on 3 January 2006, well before the Constitutional Court's decision of 6 December 2006.[16]

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11 For an excellent analysis of this case, see Royan (2008).

12 For an analysis of the decision, see Butt and Lindsey (2012, pp. 196–197).

13 159/PID/2007/PT.JKT, 7 June 2007.

14 70 K/Pid/2008, 24 September 2008.

15 Article 264 of the Code of Criminal Procedure and Article 67 of the 1985 Supreme Court Law.

16 Supreme Court Decision 153 PK/PID/2010, 3 August 2011.

2.2 Bali Bombing Case (*2003*)

The *Bali Bombing case* (2003) is perhaps the most notorious example of the Court's decisions operating prospectively. This was a challenge brought by Masykur Abdul Kadir, convicted for involvement, as an accessory, in the bombing of two nightclubs in Kuta, Bali, on 12 October 2002. He argued that his right to be free from prosecution under a law of retrospective application had been violated. As mentioned earlier in this chapter, this right is included with several others in Article 28I(1) of the Constitution as one 'not to be limited under any circumstances'. Masykur had been investigated, tried and convicted under a new terrorism law – Emergency Law 1 of 2002, issued by then-President Megawati Soekarnoputri on 18 October 2002, six days after the Bali bombings.[17]

Emergency Law 2 of 2002 was passed on the same day as Emergency Law 1. It is very short, merely declaring that Emergency Law 1 can be used to investigate, prosecute and try those involved in the Bali bombings, even though Emergency Law 1 was not in force when the bombing was planned or the bomb exploded. In other words, Emergency Law 2 purported to allow the retrospective application of Emergency Law 1. Both emergency laws were later endorsed as statutes by the DPR. Masykur challenged Law 16 of 2003, which endorsed Emergency Law 2, rather than the Anti-Terrorism Law itself (Butt and Hansell, 2004, p. 198).

By five-judge-to-four majority,[18] the Court invalidated Law 16 of 2003, finding that it breached the applicant's right not to be prosecuted under a law of retrospective application.[19] While some commentators lauded the decision for upholding human rights – even those of convicted terrorists – the decision also attracted sustained domestic and international criticism. Unsurprisingly, many observers presumed that the Court's decision meant that Law 16 had, from the moment it was passed, been unconstitutional, so that convictions obtained under it would not stand. It seemed likely that the 32 terrorists prosecuted, convicted and imprisoned under the Law for the bombings – including, on death row, Amrozi, Mukhlas and Imam Samudra – would walk free. At best, it was thought, the defendants could remain in custody if they were re-charged using laws enacted before the bombings took place, such as the Criminal Code, which prohibits murder, conspiracy and arson (Lindsey, Butt and Clarke, 2004). However, even this seemed unlikely. The main obstacle to a retrial was the

17 For more detailed discussion of Emergency Laws, see Chapter 6.

18 Asshiddiqie, Fadjar, Soedarsono, Roestandi and Marzuki in the majority; Siahaan, Palguna, Natabaya and Harjono in the minority.

19 For a translation of this decision, see Butt and Hansell (2004).

double jeopardy rule, contained in Article 76 of the KUHP and Article 18(5) of the 1999 Human Rights Law, which states:

> A person cannot be prosecuted for a second time in the same case for an act (*perbuatan*) with respect to which a court has handed down a binding decision.[20]

However, these fears were never realised. Soon after issuing the decision, then-Chief Justice Jimly Asshiddiqie called a press conference, apparently to quell fears that the applicant, and others involved in the bombing, would be released. He stated that the bombers would remain in jail because Constitutional Court decisions did not operate retrospectively. Rather, they operate only from the moment they are read in open court. The Bali Bombing decision, although binding, only prevented future investigations, prosecutions and convictions being carried out retrospectively. It would not, therefore, affect convictions already obtained. When the bombers were convicted, both emergency laws were still in force and had been endorsed by the DPR, so their convictions stood even though Law 16 was subsequently invalidated.

2.3 Death Penalty (*2007*) *and* Firing Squad (*2008*) *Cases*

In these two cases, the Court was asked to consider whether the death penalty and the way executions are performed in Indonesia – by firing squad – breached Article 28I(1) of the Constitution. This provision lists several rights that 'cannot be diminished under any circumstances', including the 'right to life' and 'the right not to be tortured'.

The *Death Penalty case* (2007) was brought by several applicants, all of whom had been sentenced to death for attempting to smuggle heroin out of Indonesia. They argued that provisions of Indonesia's narcotics laws that prescribed the death penalty violated Articles 28A ('Every person has the right to life…') and 28I(1) of the Constitution. A six-judge-to-three majority rejected this argument, pointing to Article 28J(2), which, as discussed in Chapter 4, authorises the national parliament to limit the constitutional rights of some citizens to uphold those of others, 'in accordance with moral considerations, religious values, security and public order in a democratic society'. Drawing on the text of Article 6(2) of the International Covenant on Civil and Political Rights, the Court decided that those who committed 'the most serious crimes' could have their apparently non-derogable Article 28I(1) rights overridden via

20 Although, had the convictions been quashed, then it is arguable that no 'real' prosecution took place, and Article 76 might not, therefore, apply to prevent another trial taking place.

Article 28J(2). The majority then found that serious narcotic offences were 'the most serious crimes' under the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances because they affected the 'economic, cultural and political foundations of society' and carried 'danger of incalculable gravity'. By contrast, the minority, in separate judgments, decided that the death penalty was unconstitutional because, under Article 28I(1), the right to life was absolute, even for those found guilty of serious crimes.

The following year, the Court decided the *Firing Squad case* (2008). This case was brought by three Bali bombers who had been sentenced to death – Amrozi bin Nurhasyim, Muklasi and Imam Samudra. They did not contest the constitutionality of the death penalty itself but rather how they would be executed. Death by firing squad, they claimed, was torture because more than one shot might be required. This was anticipated by the 1964 Execution Procedures Law – the statute under review. Article 14(4) of the Law states that 'If after the shooting, the convict still shows signs that he or she is not yet dead, the commander of the squad is to order an officer of the squad to fire a finishing shot' above the ear of the convict.

The Court held that pain and suffering was a natural consequence of the death penalty, however administered. Nevertheless, the method chosen should not cause undue pain and suffering. For the Court, compared with other methods discussed by various witnesses called by the applicants – including beheading, the electric chair, lethal injection, and stoning – firing squad brought a relatively swift death. However, the Court urged that new ways to carry out the death penalty more humanely and quickly be considered in light of advances in science and technology. This was a matter for the legislature, however (*Firing Squad case*, 2008, para [3.21]).

The applicants in these two cases would probably have faced very different prospects had they won (presuming that the Court had given its decisions prospective effect as in the previous cases just discussed). Had the applicants won the *Death Penalty case* (2007), they probably would have been unable to avoid execution, even if they approached the Supreme Court to have their cases reopened under the *peninjauan kembali* process discussed above. If the Supreme Court followed its decision in Sudjana's *peninjauan kembali* application, discussed above, it would have held that the death penalty could still be exacted because the drug offences were committed when the death penalty remained constitutional. Presumably the only way that the applicants could have used the Constitutional Court's decision was in an appeal to the President for clemency.[21]

By contrast, had the Court held in the *Firing Squad case* (2008) that the method of administering the death penalty was torture, the outcome would

21 On this mechanism, see Butt and Lindsey (2012, pp. 34–35).

have been less clear. Had the Court specified a more humane method, the applicants might have been executed by those means. Alternatively, had the Court invalidated the provisions stipulating the way the death penalty was carried out, no legal basis would have remained for carrying out the death penalty. With no valid procedures to execute them, the applicants might have avoided the death penalty altogether. These alternatives might have been available because the 1964 Execution Procedures Law had not been applied to them – that is, they had not yet been executed. On yet another view, however, they might still have been executed by firing squad, even had they won in the Constitutional Court, because death by firing squad was the method proscribed when they committed their offences. This view sits more comfortably with the *Lèse Majesté* case (2006).

2.4 *Discussion*

The Court's preference for decisions with prospective effect is shared by many other constitutional courts, including in Continental Europe. Indeed, Hans Kelsen himself, the architect of the world's first Constitutional Court, the Austrian *Verfassungsgerichtshof*, argued that, in the interests of legal certainty, constitutional court decisions striking down statutes should not have retroactive effect (Patrono, 2000, p. 2).[22] Nevertheless, some European constitutional courts are said to be becoming more flexible, allowing their decisions to operate prospectively in the interests of justice (Ferreres-Comella, 2009, p. 25).

Yet despite the support for prospectivity that Indonesia obtains from other constitutional courts, applying it is problematic for two reasons. First, Article 58 of the 2003 Constitutional Court Law – the provision upon which the Court has relied to justify refusing to give its decisions retrospective effect – does not in fact require the Court to give its decisions prospective effect only. Indeed, that provision seems to cover another matter entirely. Article 58 states:

> Statutes reviewed by the Constitutional Court remain in force until there is a decision declaring that the statute conflicts with the Constitution.

On a plain reading, Article 58 seems to establish a presumption: that a statute under review is constitutional while the Court is hearing a challenge to it. In other words, the operation of a statute is not suspended merely because the Court is examining its constitutionality. On my reading, Article 58 says nothing about the 'reach' of the Court's decision *after* the Court invalidates a statute. It covers the status of the statute *before* the Court invalidates it.

22 Other Constitutional Courts whose decisions operate prospectively are those of Peru, Algeria, Columbia and Venezuela (Harut'yunyan and Mavčič, 1999).

Second, future-operating decisions bring into question the Court's very purpose. They allow the legislature to enact and apply unconstitutional statutes without legal consequence, at least until an applicant challenges them. Parliament could, for example, enact a statute directing police to torture dissidents, contradicting the freedom from 'inhumane torture' guaranteed by Article 28G(2) of the Constitution, and apply it until challenged. This is undesirable for any country, let alone Indonesia, where parliamentary understanding of and respect for constitutionalism – that is, that the government should operate in line with the Constitution – are not yet firmly entrenched. Prospectivity does not merely give judicial sanction to an unconstitutional statute from enactment until invalidation. It also makes bringing a constitutional challenge largely pointless for the applicant. The absurdity of this is demonstrated in the *Lèse Majesté* case (2006), discussed above.

Prospectivity is, therefore, hardly an approach one might expect from a Court that proclaims itself as 'guardian of the Constitution' and the human rights it contains. In my view, the Court should reconsider this aspect of its decision-making and rule that statutes it declares unconstitutional are invalid from the time they become unconstitutional. For most unconstitutional statutes enacted since 1999 – the year when Indonesia's 1945 Constitution was first amended – this would be upon enactment. Earlier statutes would become unconstitutional upon enactment of the constitutional provision inconsistent with that statute. To be sure, taking this approach causes significant disruption – government action taken under a statute later declared unconstitutional will need to be 'undone' or at least compensated. Yet surely this is necessary for constitutionalism to take hold in Indonesia.

2.5 *Exceptions*

In at least four cases the Court has expressly given retrospective application to its decisions, without attempting to reconcile this with its previous jurisprudence just mentioned. The first case was the *Sisa Suara case* (2009), discussed earlier in this Chapter and again in Chapter 8. The Court considered whether its decisions could have retrospective effect, restating its interpretation of Article 58 of the 2003 Constitutional Court Law and emphasising that the Law provided neither exceptions nor judicial discretion for the Court to do so. However, for the Court, exceptions and discretions were sometimes necessary, and it had previously made decisions not explicitly permitted by the Constitutional Court Law, such as declarations of conditional (un)constitutionality.

The Court then acknowledged that 'a decision that is not given retrospective effect can, in some circumstances, lead to the non-fulfilment of

protections provided by legal mechanisms' (*Sisa Suara case*, 2009, pp. 106–107). In election-related disputes concerning vote-counting and parliamentary seat-allocation in particular, the Court's decisions:

> must be able to apply to the very voting and allocations disputes [complained of]. If not, then the purpose of the constitutional protections provided by electoral disputes and judicial review…will not be fulfilled as the constitution intends.
>
> *Sisa Suara case*, 2009, p. 107

After all, the Court continued, the decisions of virtually all other Indonesian courts – including the administrative, criminal and civil courts – operated retrospectively, so why should the Constitutional Court be limited to issuing prospective decisions? The decisions of these other courts applied from the moment the 'illegal' act was performed, not from the moment the decisions were announced in open court (*Sisa Suara case*, 2009, p. 106). Many foreign constitutional courts could also give their decisions retrospective application. The 'non-retroactive principle' was:

> therefore, not absolute, as is provided in the constitutional court statutes of various countries with constitutional courts. For statutes about particular matters, exceptions and discretion are known and universally recognised as being necessary to achieve particular legal protections relating to public order. Even more so for decisions that provide an interpretation of the constitutionality of a norm (interpretative decisions). Such decisions must naturally be retrospective from the time the law being interpreted was created because indeed this was the intended meaning given to and attaching to the norm being interpreted. Therefore, even though the Constitutional Court Law stipulates that the Constitutional Court's decisions operate prospectively, for this case, because of its special characteristics, the Court's decision must be given retrospective operation for the allocation of DPR, provincial DPRD and city DPRD seats from the 2009 elections, without compensation for the consequences of previous laws.
>
> *Sisa Suara case*, 2009, p. 108

The second, third and fourth cases in which the Court gave its decisions retrospective operation – the *KPK Commissioners* (2011), *MK Law Amendment No 2* (2011), and *State Audit Body Members* (2013) cases – can be considered together. All three cases raised a similar question: if a member of an important state

institution – such as the KPK, the judiciary or the State Audit Body – is replaced mid-term, should the replacement be appointed for the remainder of the term, or for a full term, usually four or five years?

The Court's answer was that if the replacement undergoes the same selection process as the officials holding full terms, then limiting replacements to serving out the remainder of the term was discriminatory. To avoid breaching Articles 27(1), 28D(1) and 28D(3) of the Constitution, replacements should, therefore, serve a full term. Also, the selection process was expensive, complex and time-consuming, usually involving administrative testing, public consultation and a fit and proper test conducted by the DPR. For the Court, it was unjustifiably wasteful for this process to yield an appointment for less than a full term. A preferable way to replace officials mid-term was simply to appoint the next-best candidate – the person ranked the highest out of the applicants who were not appointed. This, the Court pointed out, was how DPR and DPD members were replaced mid-term, rather than through by-election.

A legal obstacle in all three cases was the Court's self-imposed prohibition on giving its decisions retrospective effect, a prohibition it had followed consistently except for the *Sisa Suara case* (2009). The problem here was that if the Court's decisions applied only prospectively, then commissioners, judges and members already appointed as replacements would not serve full terms. The statutory provisions limiting their term to the remainder of the terms of those they replaced had already been applied.

The Court decided, in all three cases, that its decisions would operate retrospectively, so that those who had already been appointed as replacements would serve a full term. The Court provided the following reasons in the *State Audit Body Members* case (2013, para [3.21]):

> Even though according to Article 47 of the Constitutional Court Law, Constitutional Court decisions operate prospectively, in the interests of utility (a universal legal norm and objective) the Court can give its decisions retrospective effect in certain cases as was included in the [*Sisa Suara* and *KPK Commissioners* cases]. The reasons for declaring that a particular decision operates retrospectively includes that the statute had been, and was continuing to be, applied on the basis of an inappropriate interpretation, leading to legal uncertainty and constitutional damage that must be stopped. To stop this legal uncertainty and constitutional damage, one must reach back retrospectively from the time the inappropriate interpretation was stipulated, to the moment when the legal uncertainty and constitutional damage began, such as can be seen in the present case. Therefore, to avoid legal uncertainty about the office of

> replacement State Audit Body members as a result of this decision, this decision applies to State Audit Body replacements who have already been appointed and now serve as a member of the State Audit Body, so that they have the right to serve a full term, that is five years, since their appointment as a member of the State Audit Body was formalised by presidential decision.[23]

In these four decisions, then, the Court recognised the threat that forward-operating decisions pose to the utility and, ultimately, credibility of the Court and its decisions. However, while these decisions were undoubtedly desirable for applicants who brought them, the Court did not, in my view, convincingly explain why the particular circumstances of these four cases justified making exceptions to its usual decision-making practices. Surely in many, if not most, cases there will be both some 'utility' (*kemanfaat*) in applying the Court's decision retroactively and an 'inappropriate interpretation of a statute' that cannot properly be redressed only if the Court's decision operates into the future. Yet the Court has refused to give its decisions retrospective application in other cases where the interests at stake are at least as important as those in these four cases. What type of 'inappropriate interpretation' will suffice, and how much constitutional damage need it cause? Because the Court has established such vague criteria, and provided no guidance about the circumstances in which they will be met, these decisions are unexplained anomalies.

3 Injunctions

Many applicants have requested an injunction – or 'provisional' order (*putusan* or *penetapan provisi*) as they are called in Indonesia – to prevent government action being taken against them under the statute being reviewed, pending the Court's final decision. In earlier cases,[24] the Court rejected these requests, declaring that the 2003 Constitutional Court Law did not provide for them. In more recent cases, however, the Court has provided additional grounds, using as justifications for refusing to issue injunctions its inability to interfere in concrete cases and give retrospective effect to its decisions.[25]

23 For an almost identical quote taken from para 3.26 of the *KPK Commissioners case* (2011), see Butt and Lindsey (2012, p. 126).

24 See, for example, *Abdurrahman Wahid case* (2004, p. 25).

25 See, for example, *Bankruptcy Law* (2009, p. 52); *Angkouw* (2010, p. 21); *MK Law Amendment No 1*, (2011, p. 91); *Watoelangkow* (2011, pp. 17–18); and *2011 Budget* (2012, p. 135) cases.

For example, in the *MK Law Amendment case No 1* (2011), discussed in Chapter 6, the applicant challenged the constitutionality of narcotics laws under which he had been convicted at first instance. He asked the Constitutional Court to order the East Java High Court and the Supreme Court to stay further proceedings until the constitutional challenge had been decided. The Court refused, holding that it would not involve itself in concrete cases and would not, therefore, issue orders to other courts (*MK Law Amendment case No 1*, 2011 para [3.11]). Applicants wishing to stay proceedings in another court pending the outcome of a constitutional review application must directly approach that other court (*Dawud Djatmiko case*, 2005, p. 64)).

Of course, injunctions are of little utility if final decisions can have only prospective effect and will, therefore, not require the government to 'undo', or provide redress for, action taken under an unconstitutional law. Yet refusing to grant injunctions significantly weakens, perhaps ultimately nullifies, constitutional rights. For example, in the *Firing Squad case* (2008, para [3.11–3.12]), the Court specifically rejected the applicants' request for an injunction to prevent their execution pending the outcome of the challenge. In the event, the applicants were not executed until after the Court had issued its decision, in which it held that death by firing squad was not torture. But no legal obstacles prevented prosecutors from executing the applicants while the Court was hearing the case. And, if the applicants were executed before the Court issued its decision and the Court ultimately found that death by firing squad was torture, the

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In many other cases, the Court has rejected injunction requests, declaring that the injunction application is so closely intertwined with the main application that they need to be considered together. See, for example, the *DPRD Heads case* (2011). This case concerned whether a DPRD head, appointed because his or her party had more seats than other parties in the Parliament, loses this position if, because regions merge or split, the reconfiguration of the DPRD results in another party obtaining more seats than his or her party. Article 354(2) of the 2009 Representative Institutions Law stated that 'The Leadership of the DPRD originates from the political party with the highest number of votes in the DPRD'. The applicant argued that this provision was discriminatory, amongst other constitutional violations. A five-judge-to-four majority of the Court disagreed, holding that the provision was clear and was not discriminatory because it applied to all parties. The provision also upheld the people's sovereignty because the party winning more seats than in any other would lead the Parliament. To maintain representation of the people, the composition of leadership must change if the composition of local parliaments changes such as through *pemekaran*. By contrast, the minority held that the impugned provision was unjust and breached legal certainty. Once the leader of the local Parliament had been formally installed he or she could not be removed in this way.

Court would have, in essence, failed to prevent violation of a fundamental human right.

However, like many of the rules it has made for itself, the Court has not strictly adhered to its refusal to award injunctions. It has granted one, in the *Bibit and Chandra Injunction case* (2009). The applicants were Chandra Muhammad Hamzah and Bibit Samad Rianto, two Commissioners of the Anti-corruption Commission (KPK) suspended from office after police charged them for extorting bribes from KPK suspects. Under Article 32(2) of the 2002 KPK Law, once a Commissioner is formally named as a suspect – that is, formally 'charged' with an offence – he or she is to be automatically suspended. If the case proceeds to trial, then the Commissioner is automatically dismissed under Article 32(1)(c), regardless of whether he or she is found guilty. The dismissal is formalised by a presidential decision (Article 32(3)).

Anticipating being brought to trial and dismissed, Bibit and Chandra challenged the constitutionality of Article 32(1)(c), arguing that it violated the presumption of innocence. They argued that Article 32(1)(c) imposed a punishment without a conviction. They also argued that Article 32(1)(c) breached the constitutional guarantee of equality before the law: state officials from other institutions were suspended if tried, but could not be dismissed until convicted.

Like applicants in many previous cases, Bibit and Chandra asked the Constitutional Court for an injunction to maintain the status quo – that is, to prevent their dismissal – while the Court was handling their challenge. More specifically, they sought orders from the Court to prevent the criminal proceedings against them from continuing – by prohibiting police from handing over evidence to prosecutors, prosecutors bringing the case for trial, and the president from dismissing them.

The Court began by noting arguments against issuing an injunction. Article 57 of the 2003 Constitutional Court Law, which sets out the types of orders the Court can make in constitutional review cases, does not mention injunctions. This appeared to preclude the Court from ordering institutions or individuals to refrain from performing particular acts. The Law only gave express authority to the Court to issue interim injunctions in disputes between institutions of state (*Bibit and Chandra Injunction case*, 2009, para [3.12]).

However, the Court accepted the applicants' request, issuing an injunction about one month before its final decision in November 2009.[26] The Court ordered President Susilo Bambang Yudhoyono not to suspend the

26 The Constitutional Court issued its injunction on 29 October 2009 and its final decision on 25 November 2009. For a detailed discussion of both decisions, see Butt (2012a).

applicants pending this final decision (*Bibit and Chandra Injunction case*, 2009, para [3.16]), providing several justifications. First, the Court observed that it had power to regulate its own procedures and matters relating to the exercise of its jurisdiction. It could, therefore, allow itself to issue injunctions in some review cases. The Court said that it had already done this, in Constitutional Court Regulation 06/PMK/2005 on Procedural Guidelines in Judicial Review Cases. Article 16 of that Regulation explicitly permitted it to stay cases or postpone decisions in specified circumstances (*Bibit and Chandra Injunction case*, 2009, para [3.10]). Second, the Court held that injunctions were justified where the community's 'sense of justice' required it to prevent citizens' constitutional rights being violated, provided that the injunction 'strengthened legal protection' and did not 'cause legal confusion' (*Bibit and Chandra Injunction case*, 2009, paras [3.12–3.13]). The Court continued:

> The relevance and significance of issuing an injunction in a constitutional review case is to prevent the breach of human rights if a legal norm is applied while the application is still being heard, in circumstances in which the applicant's constitutional rights will not be able to be restored in the final decision. In this case, an injunction is required because of the potential constitutional damage suffered if the applicants are permanently dismissed by the President while the legal basis for the termination is being examined in this Court.
>
> *Bibit and Chandra Injunction case*, 2009, para [3.14]

After all, the Court noted, as the sole institution with powers of constitutional review, the Court's function was not merely to uphold the Constitution, but also to 'preventatively protect' the constitutional rights of citizens (*Bibit and Chandra Injunction case*, 2009, para [3.11]).

3.1 *Critique of the* Bibit and Chandra Injunction case (*2009*)

This case is legally problematic for several reasons. Perhaps the most fundamental is that it contradicts the Court's refusal to issue injunctions in every other case, both previous and subsequent, citing its inability to interfere in concrete cases. An example of a subsequent case is *Susno Duadji* (2010), brought by a former high ranking policeman, Susno Duadji, accused of corruption. He challenged a statute relevant to the criminal case for which he was being investigated, asking the Court to prevent police from investigating him pending the outcome. The Court refused, holding that it could only review abstract norms and provide decisions that were *erga omnes* (generally applicable to all). It could not decide concrete cases, prevent police investigations

into the applicant, or undo action already taken (*Susno Duadji case*, 2010, para 3.11).[27] Yet surely the Court did precisely this in the *Bibit and Chandra Injunction case* (2009). There, the Court ordered the President not to issue a particular decision concerning the applicants. The Court's order was not applicable to all citizens: it was directed solely towards protecting the constitutional rights of Bibit and Chandra.

The Court has even refused to grant injunctions where applicants appeared to be facing more serious and potentially irrevocable damage to their constitutional rights than those facing Bibit and Chandra. For example, reconciling the Court's injunction to prevent Bibit and Chandra's dismissal with its refusal to stay executions in the *Firing Squad case* (2008) is particularly difficult. Surely the latter case involved more serious and irrevocable damage: if the applicants were tortured to death, then this could hardly be undone. By contrast, Bibit and Chandra could have been reinstated after the Court's final decision.

The Court's subsequent refusal to issue injunctions also seems at odds with statements in the *Bibit and Chandra Injunction case* (2009) indicating that injunctions are necessary to prevent human rights violations while a constitutional challenge is being heard. Indeed, it is hard to see how the Court can, in light of these statements, avoid awarding an injunction to any applicant to prevent potential constitutional damage during the trial, at least once it grants standing to the applicant. As we saw in Chapter 3, applicants have standing to challenge statutes that damage their constitutional rights or are likely to do so. If applicants are granted standing, their constitutional rights are in peril and an interim injunction should be awarded as a matter of course.

Also legally weak was the Court's assertion that it had already issued Constitutional Court Regulation 06/PMK/2005, allowing itself to issue injunctions. In fact, Article 16 of the Regulation provides very narrow grounds for doing so, authorising the Court to stay or delay its own proceedings only if the applicant alleges that the criminality was involved when the statue under review was drafted. Presumably, the rationale for Article 16 is that any criminal proceedings relating to the legislative process should be resolved in the general courts before the Constitutional Court hears the case. Halting its own proceedings pending the outcome is very different to ordering an entity or individual to perform or refrain from performing an act.

Further, the Court did not reconcile its assertions that Article 16 authorised injunctions with its observation that the 2003 Constitutional Court Law itself

27 The Court also rejected, on similar grounds, an application for an injunction brought by former Justice Minister Prof. Dr. Yusril Ihza Mahendra. See the *Mahendra case* (2010, p. 125), discussed in Butt (2012a).

seemed to prohibit them. A fundamental principle of Indonesian law, mentioned in Chapter 4, is that a 'lower-level' law must not contradict a 'higher-level' law. The Constitutional Court Law itself provides the legal authority upon which the Court relies to issue these types of procedural regulations. These regulations must not, therefore, contradict that Law, as Article 16 arguably does.

Why, then, did the Court award an injunction to Bibit and Chandra? The answer is probably more political than legal. It was widely suspected that these two KPK Commissioners had been 'set up' and were innocent of the bribery charges leveled against them. They had been investigating allegations of high-level police corruption, and many commentators and journalists had convincingly asserted that they had been framed by those they were investigating. Indeed, when charging them the police presented almost no evidence that Bibit and Chandra had been involved in wrongdoing. The controversy evolved into a battle between the reformist and publicly popular KPK and corrupt police heavyweights – a battle that the KPK appeared likely to lose. In this context, the Constitutional Court, which also sees itself as reformist, sided with the KPK – a move that undoubtedly increased the Court's public popularity. KPK-wiretapped conversations revealed a conspiracy between senior police, prosecutors and suspects the KPK was investigating to frame Bibit and Chandra. The Court allowed these recordings to be played during the Constitutional Court's 'full' hearing of this case, even though their relevance to the application, and hence their admissibility, was highly doubtful. By doing so, the Court probably 'saved' Bibit and Chandra from jail and perhaps even the KPK from serious efforts to undermine it (Butt, 2012a).

CHAPTER 6

Jurisdictional Expansion

In March 2008, Mahfud, who would later become the Constitutional Court's second Chief Justice, underwent a 'fit and proper' test in parliament to determine whether he was a suitable appointment to the Court.[1] Mahfud gave a presentation entitled 'The Constitutional Court as an Independent Judicial Institution'. This presentation was structured around ten 'pillars' (*rambu*), designed to prevent the Constitutional Court from exceeding the boundaries of its jurisdiction or otherwise interfere with the powers of other branches of government. According to these pillars, the Constitutional Court should avoid:

1. Making decisions that 'regulate'. The Court can only operate as a negative legislator. It cannot invalidate a norm and then fill the legal vacuum thereby created. Mahfud said: 'This is wrong. Regulating is the responsibility of the legislature, not the Constitutional Court' (Budiarti et al., 2013, p. 420).
2. Making decisions that are 'ultra petita' – that is, decisions 'above' what the parties requested, such as a declaration of constitutional invalidity that the applicant did not seek.[2]
3. Basing its decisions on statutes rather than the Constitution.
4. Intervening in the delegation and 'attribution of constitutional authority'. If the Constitution states that an issue is to be 'further regulated by statute', then the Constitutional Court cannot invalidate that statute.
5. Making decisions based on theory. 'The Constitution is what is written in the Constitution even if this does not accord with the theory of John Locke or someone else' (Hukumonline, 2008b). Similarly, Constitutional Court decisions should not be based on legal principles applicable in other countries, however advanced those countries, because other countries can have different constitutional provisions to Indonesia's.
6. Deciding cases in which the Court's own interests are at stake.
7. Commenting on a case currently before the Court.
8. Encouraging people to bring a case before the Court.

1 The following description of Mahfud's presentation draws from Budiarti et al. (2013, pp. 419–38) and Mahfud (2009).

2 Mahfud (2007) had already written newspaper articles making a similar point.

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9. Becoming involved in political rather than legal disputes.
10. Providing an opinion about the existence, strengths or weaknesses of the Constitution itself. Constitutional change is a matter entirely for the MPR.

These 'pillars' were not 'guidelines' or 'prohibitions' that Mahfud promised to promote if appointed to the Court, but rather were aspirational principles that Mahfud proclaimed the Court *should* follow. At the time Mahfud gave this presentation, the Court was, for the most part, not engaging in many of the activities that these pillars appeared to address. It had not, to my knowledge, encouraged people to bring cases; highlighted the Constitution's strengths and weaknesses or otherwise disparaged it; or commented on pending cases. (Though after the Court issues an important decision it often holds a press conference to clarify the decision and its ramifications, particularly if the decision is criticised by legal commentators or the press. As Mahfud states in one bibliography, if people criticise a decision in a way that undermines the Court's authority, 'I will shout until everything is sorted out' (*Saya berteriak sehingga beres*) (Budiarti et al., 2013, p. 430).) The Court had also not, to my knowledge, overtly interfered in resolving political disputes, or based any decision entirely on theory – though, as mentioned in Chapter 3, it refers to legal scholarship in its decisions to add legitimacy to its holdings. However, the Court was already engaging in other types of decision-making at which the remaining pillars were directed.

Mahfud passed the 'fit and proper' test and was appointed as a judge to the Constitutional Court soon thereafter. If legislators had hoped that Mahfud would, once appointed, establish these pillars as guiding principles for the Court's decision-making, they were to be sorely disappointed. As he admitted in a biography, these were merely opinions, which were 'too academic and not practical', put forward for the purposes of the fit and proper test process (Budiarti et al., 2013, pp. 419, 424). Since joining the Court, and particularly since becoming its Chief Justice, Mahfud has ignored these pillars and moved the Court further away from them. Under his leadership, the Court has expanded its authority, perhaps even its jurisdiction, arguably beyond constitutional bounds.

As we shall see in this Chapter, the Court commonly 'regulates' by issuing decisions which declare legislation unconstitutional unless interpreted in a way the Court specifies. It also issues *ultra petita* decisions, invalidating statutory provisions – sometimes even entire statutes – not mentioned in applications. Also, as discussed in Chapter 4, the Court has reviewed statutes dealing with its own interests, including its own governing law. It has also invalidated

statutes for contradicting other statutes, rather than the Constitution, classifying this as a breach of the constitutional guarantee of 'legal certainty'. Finally, even though the Court has, in decisions discussed in Chapter 4, given leeway to the legislature to implement the Constitution, it has interfered in the 'delegation' of constitutional authority, primarily by evaluating government policy.

The Court has expanded its jurisdiction in two other ways not included in Mahfud's pillars. First, it has reviewed the constitutionality of Interim Emergency Laws issued by the President, despite having no clear constitutional authority to do so. Second, it has identified constitutional rights that are not expressly mentioned in the Constitution. The Court has found these rights to be necessary implications of particular constitutional concepts – namely the 'rule of law' (*negara hukum*) and 'the people's sovereignty' (*kedaulatan rakyat*).

1 The 2011 Amendments and Their Invalidation

In June 2011 the national parliament amended the 2003 Constitutional Court Law. Some of the amendments changed how the Court was supervised and its judges investigated in the face of alleged impropriety. These were discussed in Chapter 3. More important for this chapter were amendments prohibiting the Court from continuing to employ four decision-making practices by which it had appeared to be expanding its authority: issuing *ultra petita* decisions, declarations of conditional (un)constitutionality and orders to lawmakers; and invalidating statutory norms by reference to other statutes rather than the Constitution.

However, within only a few months the Court had invalidated the amendments directed at prohibiting these practices. It did so in two decisions, issued on the same day – 18 October 2011. As we shall see later in this Chapter, to invalidate these amendments, the Court used many of the very types of decisions that lawmakers wished to eradicate by enacting the amendments.

The *MK Law Amendment case No 1* (2011) was brought by an Indonesian citizen convicted of drug offences. The Surabaya District Court had sentenced him to five years' imprisonment under Article 112 of the 2009 Narcotics Law, which prohibits 'possessing, storing, controlling or providing' class I non-plant narcotics. He had argued that Article 112 was intended to capture dealers and distributors, and should not have been used to prosecute him because he was only a user. The applicant did not petition the Constitutional Court to invalidate provisions of the 2009 Narcotics Law but rather to add two qualifications to it, by issuing declarations of conditional unconstitutionality. First,

he wanted the Court to change Article 112 to prevent its application against people merely found with narcotics. Specifically, he asked the Constitutional Court to add 'with the aim of distributing or being used by another person' to Article 112 to clarify that the provision should apply to distributors.

Second, he argued that he had a right to rehabilitation for drug addiction but that the Narcotics Law failed to provide it. This right, he claimed, was grounded in his constitutional rights to 'protection of one's person' (Article 28G(1)), 'freedom from treatment that undermines human dignity' (Article 28G(2)), and to 'health services' (Article 28H(1)) (*MK Law Amendment case No 1*, 2011, pp. 8–9). He asked the Court to insert the right to rehabilitation into Article 127(1)(a) of the Law, which applies to drug users.

Both requests required the Court to issue declarations of conditional unconstitutionality. While the Court rejected the applicant's challenge to the 2009 Narcotics Law, the Court did invalidate various provisions of the 2011 Amendments. These included amendments that prohibited the Court from issuing declarations of conditional unconstitutionality, orders to lawmakers and *ultra petita* decisions – even though, as discussed below, the Court did not award anything to the applicant, let alone something more than he had sought.

The *MK Law Amendment case No 2* (2011) was brought by eight well-respected constitutional law academics – including Prof Dr Saldi Isra, Prof Dr Arief Hidayat (who later served as a Constitutional Court judge) and Zainal Arifin Mochtar. They challenged ten provisions of the 2011 Amendment to the 2003 Constitutional Court Law,[3] including the prohibition on judges invalidating statutes by reference to other statutes rather than the Constitution. An eight-judge-to-one majority of the Court agreed to strike down this prohibition and several other amendments.[4]

2 Structure of This Chapter

The remainder of this chapter describes the primary decision-making practices through which the Court has arguably expanded its authority or jurisdiction. I begin with the four types of decision-making that the 2011 Amendments sought to curb: conditional (un)constitutionality, ultra petita, reviewing statutes against other statutes, and issuing orders. I illustrate how

3 These included provisions concerning the composition of the Constitutional Court Honour Council and the prerequisites for appointment to the Constitutional Court – matters covered in Chapter 3.

4 With Justice Harjono issuing a sole dissent.

the Court employs each of these practices, before examining how the government attempted to prohibit them through the 2011 Amendments and the reasons the Court gave for invalidating those prohibitions in the *MK Law Amendment* cases.

I then discuss three other types of decisions mentioned earlier in this Chapter, which the legislature did not seek to ban in 2011 but which arguably involve the Court moving beyond its jurisdiction. In the first two types, the Court reviews government policy (even if that policy appears to fall within the 'corridor of constitutionality') and emergency laws. In the third, the Court appears to have 'implied' constitutional rights.

As we shall see, the Court appeared to have employed questionable reasoning to justify expanding its authority in these ways. The Court's reasoning in the *MK Law Amendment* cases was particularly weak, leading to speculation that the Court's main priority was, at the first opportunity, to invalidate key provisions intended to rein it in rather than to assess the challenges on their merits (Butt and Lindsey 2012: 155–56).

3 Conditional (Un)constitutionality

From its earliest days until around the beginning of Mahfud's term as chief justice, the Constitutional Court issued many decisions in which it declared the statutory provisions under review to be 'conditionally constitutional', rather than simply constitutional or unconstitutional (and hence invalid). This the Court did when it decided that the statute had doubtful constitutionality, but that this could be corrected if interpreted in a way that would make it constitutional. The Court also issued this type of decision when it found that a provision was clearly unconstitutional but wanted to avoid the undesirable legal vacuum that would result from invalidation.

Indonesia's Constitutional Court is not the only constitutional court to issue these types of decisions. They have long been employed in other constitutional courts, including the French and German (Koopmans, 2003, pp. 118, 120; Autheman, 2004, p. 9). The most likely source of influence, however, is the South Korean Constitutional Court – to which the Indonesian Constitutional Court has often looked for practical guidance.[5] Between September 1998 and June 2009, the South Korean Constitutional Court declared 340 legal norms conditionally unconstitutional (Croissant, 2010, p. 558).

5 See, for example, the Court's comments in the *Robertus case* (2009, p. 80).

In its early years, the Court tended to impose somewhat vague 'conditions' on the constitutionality of statutes. For example, in the *Film Censorship case* (2006), applicants challenged film censorship for violating the constitutional right to free speech. The Court accepted that censorship was necessary to 'protect the people'. However, it declared the 2002 Broadcasting Law's censorship provisions conditionally constitutional – that is, constitutional provided that the Censorship Board applied them in line with democratic principles and freedom of expression. In particular, the Board needed to interpret the statute consistent with the 'spirit of the times' – that is, the 'spirit of democracy' and 'respect for human rights'. Presumably, the Court meant that the Board should not censor on political grounds, although it did not explicitly state this.

From 2008, the year when Mahfud joined the bench, the Court began declaring statutes conditionally unconstitutional – that is, unconstitutional and hence invalid unless implemented or applied in a way the Court specified as constitutional. Another way in which the Court 'casts' these decisions is to declare a statutory provision invalid unless given a specified meaning (*dimaknai*). In the *Tobacco Excise case* (2008, para [3.22]), the Court offered the following explanation:

> In several decisions, the Constitutional Court has declared the statute under review to be conditionally constitutional. Experience has shown that [these decisions] have not been immediately adhered to and that, therefore, the decisions have not been effective. To uphold the Constitution, both by those who implement and those who make statutes, the Court will…declare that the provision under review conditionally breaches the Constitution. This means that the provision is unconstitutional if the requirements the Constitutional Court stipulates are not met…The provision under review has, therefore, no binding force if, when implemented, the requirements stipulated by the Court are not fulfilled.

This is a highly significant presumptive shift. Declaring statutes conditionally constitutional and allowing them to remain in force 'provided that' conditions were met left the Court unable to intervene if the conditions were ignored. In one case – the *Water Resources Law case* (2005, p. 495) – the Court declared that it could review statutes again if conditions were disregarded. However, the Court could probably not have done this on its own initiative, having to rely upon another application for review being lodged against the same statutory provision. This has never happened. Changing the 'default' position to invalidation 'unless' a condition is met, gives the Court's decisions more weight: the

statutory provisions declared conditionally unconstitutional cannot be legally applied without meeting the condition.

As discussed in Chapter 3, the Court issued far more conditional decisions under Mahfud's leadership than under Asshiddiqie's. Also around the time Mahfud took over, the Court became more specific in its conditions, so that they resembled legislative amendments. One of the most illustrative recent examples of this is the *Wedlock case* (2010). In it, the Court was asked to consider the constitutionality of Article 43(1) of the 1974 Marriage Law. Article 43(1) provided that a child born out of wedlock had a civil legal relationship only with its mother and mother's family. The child could not claim maintenance or an inheritance from its father. The Court decided that Article 43(1) would be unconstitutional unless interpreted to be given the following meaning:

> A child born out of marriage has a civil legal relationship with its mother and her family, and its father and his family [provided that paternity] can be proven by science and technology and/or another form of legally-recognised evidence that the father has a blood relationship with the child.

Putting aside the obvious desirability of the decision, the Court has changed the words of Article 43(1) of the 1974 Marriage Law, granting rights to children, creating obligations for biological fathers, and dictating how these rights and obligations arise. These are really matters for the legislature, whose job is to make law. By issuing decisions such as these the Court has usurped the function of the legislature and arguably undermined the separation of powers.[6]

Also from around the beginning of Mahfud's reign, the Court began making declarations of conditional (un)constitutionality in its final holdings (*amar putusan*) or orders.[7] Previously, the Court had included these declarations in the section of its judgment containing its legal reasoning (*pertimbangan hukum*) (Asshiddiqie, 2008, p. 178). Although most commentators and judges now seem to agree that both the Court's holdings and reasoning are equally binding, different opinions were being voiced in the mid-2000s (Butt, 2007a). By including these declarations as part of its holdings, the Court put their status beyond any doubt.

The Court has also used its conditional unconstitutionality decisions to correct editorial errors in legislation. For example, in the *Campaign Funding*

6 Another landmark case in which the Court imposed specific conditions that were tantamount to statutory reforms was *Sisa Suara* (2009), discussed in Chapter 8.

7 To my knowledge, this practice first emerged in the *DPD Domicile case* (2008).

case (2012), the Court was presented with a clearly erroneous cross-reference in the 2004 Regional Government Law. Article 116 of that Law imposed a penalty on officials who 'deliberately violated the rule referred to in Article 83' of the Law. However Article 83 concerned campaign funding, and did not mention officials. It was clear that the reference to Article 83 was an error and that Article 116 should have, instead, referred to Article 80, which prohibits officials from doing anything to advantage a candidate during a campaign. The Court held Article 116 invalid unless given the meaning 'as referred to in Article 80' instead of 'as referred to in Article 83' (*Campaign Funding case*, 2012, pp. 54–5).

These 'conditional' decisions are not beyond reproach, as discussed below. There are, however, some particularly pragmatic reasons for using them in Indonesia. The DPR is notoriously unresponsive and sometimes for long periods enacts no legislation. Also, as mentioned, the legislature has rarely issued legislation in response to Constitutional Court decisions. In this context, striking down legislation would probably result in a prolonged legal vacuum during which the invalidation might put the applicant, and others, in a worse legal position. For example, had the Court simply invalidated Article 43(1) of the 1974 Marriage Law in the *Wedlock case* (2010), illegitimate children might have no legal basis to claim, even from their mothers.

3.1 *2011 Amendments and the Court's Response*

The 2011 Amendments sought to insert Article 57(2a) into the 2003 Constitutional Court Law. Article 57(2a) read as follows:

Constitutional Court decisions are not to contain:

a) holdings other than those referred to in Articles 57(1) and 57(2);
b) orders to lawmakers; and
c) formulations of norms to replace norms in a statute declared unconstitutional.

Article 57(1) states that if the Court finds a statute unconstitutional, it is to declare that statute to no longer be in force. Article 57(2) requires the Court to declare that statutes not enacted in accordance with constitutional processes to be no longer in force.

Article 57(2a)(c) appeared directed towards prohibiting the Court from issuing declarations of 'conditional constitutionality' and 'conditional unconstitutionality'. Such declarations would also presumably fall foul of Article 57(2a)(a) because they involve the Court including something in its holding other than declaring the impugned statutory provision invalid and

of no binding force. Former Law and Human Rights Minister, Patrialis Akbar, when introducing the amendments before parliament, announced that they would prevent the Court from acting as a 'positive legislator' (Hukumonline, 2011b).

In the *MK Law Amendment case No 1* (2011), the Court invalidated Article 57(2a), giving the following reasons:

> According to the Court, Article 57(2a) conflicts with the purpose of establishing the Constitutional Court: to uphold the law and justice, particularly in the framework of upholding the constitutionality of the norms of statutes in accordance with the Constitution. Article 57(2a) impedes the Court in (i) reviewing the constitutionality of norms; (ii) filling in legal gaps as a result of a Constitutional Court decision declaring a norm to conflict with the Constitution and no longer having binding force. Creating new statutes takes so long that it is not possible to fill the legal vacuum quickly; (iii) fulfilling the obligations of constitutional court judges to uncover, follow and understand the legal values and sense of justice alive within the community.
>
> *MK Law Amendment case No 1*, 2011, p. 94

The Court provided no further justifications for invalidating this provision. With respect, its reasoning does not withstand even cursory scrutiny and was hardly adequate to support the invalidation. Article 57(2a) cannot conceivably impede the Court 'reviewing the constitutionality of norms' and 'following community legal values'. This is because the provision does not limit the nature of the Court's enquiry. Rather, it limits the types of 'orders' the Court can issue after it has already assessed the statute's constitutionality (Butt and Lindsey 2012, p. 152). If, after reviewing a statute and considering these community values, the Court finds constitutional fault with the statute, only then does Article 57(2a) become applicable, by confining the Court solely to invalidating it.

Further, the Court did not address the most commonly-made criticism of its conditional constitutionally decisions – that statutory gap-filling, when performed by the judiciary rather than the legislature, breaches the separation of powers. This is important because, on the one hand, the Court is charged with upholding the Constitution, but on the other it appears to be violating one of its most important principles. Although the anticipated delay in legislative response to its invalidations might be a good pragmatic reason for issuing 'conditional' declarations, such reasons surely cannot justify overriding the Constitution's division of legislative and judicial power.

4 Orders to Lawmakers

In a relatively small number of cases, the Court has issued what might be interpreted as 'orders' to lawmakers. In these cases, the Court has decided that a statute is unconstitutional but has then refused to strike it down because the consequences of invalidation would be too great. Instead, the Court has asked the government to make further attempts at compliance or has set a deadline within which the government must replace the statute or provision.

4.1 Education Budget Cases

The Court issued these types of 'orders' in a series of four challenges brought by the Indonesian Teachers' Association and its supporters against the national budgets of 2005–2008.[8] (National budgets are enacted as statutes, giving the Court jurisdiction to test their constitutionality.) They argued that each budget violated Article 31(4) of the Constitution, which requires the state to:

> prioritise the budget for education to be at least 20% of the state budget and national budget to fulfil the needs of national education.

In each case, the Court declared that the national budget was unconstitutional for violating Article 31(4) – that is, it allocated less than 20% for education. However, in the first three cases, the Court refused to invalidate the budget, fearing that doing so would risk 'governmental disaster in state financial administration', which would likely cause legal uncertainty (*2005 Budget Law case*, 2005, p. 62). Instead, it urged the government and legislature to do more to meet the 20% requirement, increasing the intensity of its urgings from year to year. In the *2006 Budget case* (2005), for example, the Court decided not to invalidate the budget provided that the government did not cap the maximum amount that could be allocated to education.[9] According to the Court, the government could thus divert to education any surplus funds from other sectors (*2006 Budget Law case*, 2005, p. 86).

By the *2007 Budget case* (2007), however, the Court was losing patience with lawmakers. The *2005 and 2006 Budget* cases had given ample 'opportunities' to meet the requirement, yet the government and DPR had not 'put in optimal effort' to meet it. The Court said:

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8 *2005 Budget case* (2005); *2006 Budget case* (2005); *2007 Budget case* (2007); *2008 Budget case* (2008).

9 The budget had capped the allocation at 9.1%.

> as guardian of the Constitution it must warn (*mengingatkan*) that the 20% budget allocation to education must be genuinely prioritised and achieved so that the Court does not need to invalidate the entire budget…
>
> *2007 Budget* case, 2007, para [3.15]

By 2008 the Court had decided that it could no longer stand idly by while lawmakers continued to flaunt the Constitution. For the Court, the rule of law (*negara hukum*) and the authority of the Constitution itself were at stake. In the *2008 Budget Law case* (2008), it invalidated the 2008 budget, but not with immediate effect. Rather, it delayed its decision coming into force until the 2009 Budget was enacted. If the 2009 Budget did not meet the 20% allocation, then the Court would invalidate it, pointing to this decision. Once again, the Court 'warned' lawmakers to meet the 20% requirement (*2008 Budget Law case*, 2008, pp. 100–1).

The national parliament eventually allocated 20% to education in the 2009 Budget (Desafti, 2010). However, whether this was because of the Constitutional Court's 'threats' is unclear. Indonesia's spending on education increased almost threefold between 2002–2012 (Cerdan-Infantes, 2012), but a World Bank report charting this increase did not mention the Court's decisions (World Bank, 2013).

4.2 Anti-Corruption Court Case (*2007*)

In the *Anti-corruption Court case* (2007) the Court found another statute to be unconstitutional but refused to invalidate it with immediate effect, cognisant that the consequences would be highly undesirable. This was a challenge to Article 53 of the 2002 KPK Law, which stated that:

> By this statute an Anti-corruption Court is established, which has the task and jurisdiction to examine and decide corruption cases prosecuted by the Corruption Eradication Commission (KPK).

For the Court, Article 53 was constitutionally objectionable because it established a 'two-track' system. The cases that the KPK chose not to investigate and prosecute would continue to be handled by ordinary police and prosecutors – as they had been before the establishment of the KPK and Anti-corruption Court (ACC). Yet investigations, prosecutions and trials by the KPK and ACC were subject to different procedures, primarily introduced to make them easier and more likely to result in convictions (Fenwick, 2008). For example, unlike ordinary police, the KPK has power to tap and record conversations, issue

travel bans, block accounts and particular transactions, and order government agencies to suspend suspects (Article 12(a) of the 2002 KPK Law), all without prior judicial approval. Further,

> [u]nlike the general courts, where three career judges sit on most panels, the ACC was designed with five-judge panels, comprising two career judges drawn from the general courts and three so-called ad hoc judges. These are legal experts, usually academics, practitioners and retired judges, employed to sit on ACC trials. The rationale for their inclusion was that, because they work outside the existing largely-corrupt judiciary, they were less likely to seek or accept bribes to fix the outcomes of cases.
>
> BUTT, 2012a, p. 2

This two-track system appeared to work successfully – at least from the perspective of anti-corruption advocates. Before 2011 there was only one ACC, located in Jakarta. It maintained a 100% conviction rate in the 50 or so cases it decided each year (Butt, 2011). By contrast, the general court conviction rate in corruption cases remained closer to 50% (Butt, 2011).[10] For the Constitutional Court, the differences in the way corruption cases were handled in these parallel systems created 'dualism', thereby violating the constitutional right to equality before the law.

The Court recognised that invalidating Article 53 of the 2002 KPK Law would disband the ACC (Asshiddiqie, 2008, p. 173). Yet the anti-corruption drive was critically important and the KPK and ACC had made significant progress. Instead of invalidating the Article, the Court gave the legislature three years to pass new legislation providing a constitutionally-valid legal basis for the ACC. The Court justified allowing Article 53 temporary effect on the following grounds:

> The Court views corruption, which has damaged the social and economic rights of the Indonesian community, as an extraordinary crime and a common enemy of the community and nation as a whole. Therefore, the human rights sought to be upheld through this review of the KPK Law are small-scale in comparison to the protection of the economic and social rights of the majority of the community damaged by corruption. Corruption has weakened the ability of the state to provide adequate

10 Of course, maintaining a 100% conviction rate for so many years raises questions about the impartiality of the court and the presumption of innocence. For discussion of these issues, see Butt (2009a, 2012b).

> public services and has impeded the effective functioning of the state. This has become a heavy economic burden because it has created high macroeconomic risk that has endangered financial stability, public security, law and order. Moreover, it can undermine the legitimacy and credibility of the state in the eyes of the people.
>
> *Anti-corruption Court case*, 2006, p. 287

In this context, restricting the legal consequences arising from invalidating Article 53 was, in the Court's view, in the 'greater public interest' and would help avoid 'legal chaos' (*Anti-corruption Court case*, 2006, pp. 286, 288). The Court, therefore, delayed the implementation of its own decision, even though the 2003 Constitutional Court Law did not explicitly permit this (Asshiddiqie, 2008, p. 173).

These decisions were driven by pragmatism, reflecting the need to ensure both the smooth functioning of the state (in the *Budget* cases) and continuing progress in corruption eradication (in the *Anti-corruption Court case*). However, the Court's approach in these cases was legally questionable, largely because it did not explain the circumstances in which it will allow a statute to remain in force, despite being unconstitutional, awaiting government response. Many, perhaps even most, of the statutes the Court has reviewed sought to achieve or protect similarly important goals and interests, yet the Court struck them down for unconstitutionality or declared them conditionally (un)constitutional. Perhaps the types of issues raised in the *Budget* and *Anti-corruption Court* cases are too complex to be resolved using 'conditional' decisions, but require significant statutory overhauls rather than 'tinkering' with a few provisions.

4.3 *2011 Amendments and the Court's Response*

The 2011 Amendments prohibited the Court from issuing decisions containing 'orders for lawmakers' (Article 57(2a)(b)). Instead, the Amendments required the Court to either declare statutes unconstitutional and hence invalid, or leave them be (see Articles 57(1), (2) and (2a)(a)).

Why the legislature sought to prevent the Court from issuing such decisions is unclear and is not revealed in the transcript of the parliamentary debates about the Amendments. Perhaps Article 57(2a)(b) was the product of a legislature resentful of taking dictation. However, if true, this resentment was misconceived – surely outright invalidation is far worse for the legislature than a gentle nudge or even a veiled threat, with sufficient time given for compliance. In the *Budget cases*, for example, the Court spared the legislature from having to reconvene to discuss and enact a new budget.

As mentioned above, in the *MK Law Amendment case No 1* (2011) the Court invalidated Article 57(2a), which includes Article 57(2a)(b). However, it provided no reasons for doing so. The Court did not even identify 'orders to lawmakers' as a type of decision it had previously made, let alone discuss why Article 57(2a)(b) was unconstitutional. The prohibition on 'orders' was swept away with the Court's invalidation of Article 57(2a) to remove the prohibition on 'conditional (un)constitutionality'.

5 Ultra petita

The Constitutional Court has issued many decisions that are *ultra petita* – that is, that invalidate provisions about which the applicants did not specifically complain. The Court appears to do this in two main circumstances. The first is when to invalidate one provision of a statute would render connected provisions obsolete. In such cases, the Court often also invalidates these connected provisions. In several cases the Court has invalidated entire statutes, even though applicants sought review of only a few provisions. The Court has done this where it declares provisions unconstitutional that constitute the 'heart' (*jantung*) of the statute, and finds that to invalidate them would leave the statute inoperative, at least in the way the legislature intended. Invalidating the entire statute is, in these circumstances, what the 'public interest demands' (*Truth and Reconciliation case*, 2006, p. 126).

The Court invalidated an entire statute in its first decision – the *Electricity Law case* (2003). As mentioned in Chapter 3, this case required the Constitutional Court to review provisions of the 2002 Electricity Law that allowed significant private sector involvement in the electricity sector. The Court held these provisions to be unconstitutional because Article 33(2) of the Constitution required the state to maintain 'control' over that sector. But the Court did not stop there, holding that increasing competition – by encouraging private sector involvement in various aspects of electricity generation, distribution and sale – was at the heart of the Law. The Court therefore declared the entire statute invalid on the ground that it violated 'the soul and spirit' of Article 33(2), which, according to the Court, 'formed the basis of the Indonesian economy' (*Electricity Law case*, 2003, pp. 349–50). To invalidate only a small part of the statute would have 'caused chaos that would lead to legal uncertainty' in the Law's application (*Electricity Law case*, 2003, pp. 349–50).[11] The Court reinstated the previous

11 However, the Court did not invalidate contracts or licences signed or issued under the 2002 Electricity Law, allowing them to continue until they expired, as discussed in Chapter 5.

1985 Electricity Law because Article 70 of the 2002 Law – which declared the 1985 Law to be no longer in force – was, itself, no longer valid.

Second, the Court has issued *ultra petita* decisions if, when performing constitutional review, it uncovers unconstitutional provisions that the applicants did not mention in their application. For example, in the *DPD Jurisdiction case* (2012), discussed in Chapter 7, the applicants argued that several provisions of the 2009 Representative Institutions Law prevented the DPD from performing its constitutionally-delineated functions. The Court agreed, invalidating them and declaring others conditionally unconstitutional. However, in the Court's view, the applicants had not challenged all provisions in the statute that impermissibly impeded the DPD. These the Court identified and declared unconstitutional, even though the applicants had not sought their review.

In yet other cases, the Court has taken the opportunity presented by a constitutional review to make determinations that are not strictly relevant to the application. The Court most famously did this in the *Supreme Court v Judicial Commission case* (2006), discussed in Chapter 4. There, the Supreme Court had asked the Court to consider whether the Judicial Commission had jurisdiction to supervise it, particularly by examining its decisions. In the course of deciding that the Commission lacked jurisdiction, the Court also held that the Commission could not supervise the Constitutional Court itself. The Supreme Court had not asked the Constitutional Court to address this issue, and would have probably been denied standing if it had.

5.1 *2011 Amendments and the Court's Response*

Article 45A of the 2011 Amendments prohibited *ultra petita* decisions, preventing the Court from issuing decisions that 'contain a holding that was not sought by the applicants, or that exceeds what the application sought'.

The Court invalidated Article 45A in the *MK Law Amendment case No 1*, employing the following reasoning. While in civil law matters the courts cannot award plaintiffs more than they request,[12] public law cases, particularly constitutional reviews, are different. Unlike civil cases, where judicial decisions usually apply only to the parties, judicial review decisions apply generally (*erga omnes*) because they affect statutes that are applicable to all citizens and legal entities. One implication of this is:

> [i]f the public interest so requires, constitutional court judges must not limit themselves to the application or the *petitum*. Even if what the

12 Articles 178(2) and (3) of the *Herziene Indonesisch Reglement* and Articles 189(2) and (3) of the *Reglement Buitengewesten*.

> applicant requests relates only to one provision…but that provision is the core provision of the statute, then the other provisions in the statute under review cannot possibly be maintained…and [the statute] must be declared to have no binding force in its entirety.
>
> *MK Law Amendment case No 1*, 2011, p. 92

The Court observed that foreign courts exercising constitutional jurisdiction also issue *ultra petita* decisions. The United States Supreme Court, in *Marbury v Madison* (1803), for example, had decided that the individual interests of applicants did not confine the Court's enquiry in constitutional matters. The South Korean Constitutional Court Law also allows its Constitutional Court to invalidate entire statutes if invalidating the provision(s) requested by the applicants renders that statute unenforceable (*MK Law Amendment case No 1*, 2011, p. 92).

The Court concluded with the following statement:

> The presumption that by issuing *ultra petita* decisions the Court is abusing its powers is caused by a misunderstanding of the judicial review function…The public interest that requires judges to guard the Constitution is bigger than individual interests. One of the purposes of creating the Constitutional Court with judicial review is to fix up the law. To that end, constitutional court judges must uncover, follow and understand the legal values and sense of justice alive in the community to create new law…to guard against legal vacuums. Therefore, Article 45A… breaches the Constitution.
>
> *MK Law Amendment case No 1*, 2011, p. 93

The Court is arguably correct that the narrow interests of applicants should not limit decision-making in constitutional cases. If, while hearing a case, the Court discovers an egregious breach of constitutional rights, it should be able to remedy it in the public interest. As the Court has said, statutes apply equally to all. An unconstitutional statute or statutory provision should not be maintained merely because an applicant has not asked the Court to review it.

Nevertheless, the Court's reasoning to justify invalidating Article 45A was far from convincing. In particular, its decision about the constitutionality of *ultra petita* decisions was itself *ultra petita*. The Court did not propose awarding something 'above' what the applicant had sought. Indeed, ultimately the Court rejected the applicant's challenge to the 2009 Narcotics Law. Article 45A, therefore, had no bearing on this case.

6 Legal Certainty

Article 28D(1) of the Constitution provides citizens with the right to 'legal recognition, guarantees, protection and certainty that is just, and to equal treatment before the law'. The Court has used Article 28D(1) perhaps more often than any other constitutional provision to strike down statutes or declare them conditionally (un)constitutional. The Court has most commonly employed Article 28D(1) in two broad categories of cases. The first is when presented with provisions of one statute which are inconsistent with those of another statute. The 'uncertainty' is over which statutory provision should be applied. To resolve the uncertainty, the Court often invalidates the inconsistent provision of one of the statutes.[13]

The second category of legal certainty cases has involved statutory provisions with unclear wording, making them susceptible to multiple interpretations or inconsistent with other provisions in the same statute. A clear example is the *Sisa Suara case* (2009). There, the Court found that one of the challenged provisions used the word 'vote' in a way that could be interpreted in at least three ways. In the event, the Court decided that the provision would be unconstitutional unless the Court's preferred interpretation were followed.

The *Mahendra case* (2010) provides another example of the Court using legal certainty to declare an unclear statutory provision conditionally unconstitutional. This case was brought by former Justice Minister Yusril Ihza Mahendra, who was being investigated by the Attorney-General's Office for corruption. Mahendra attempted to establish that the Attorney-General's term of office had expired, rendering the investigation invalid.

Mahendra argued that Article 22(1)(d) of the 2004 Public Prosecution Law violated the legal certainty guarantee. This provision states that the Attorney-General is to be honourably discharged at 'the expiry of his or her term of office'. However, the Law did not stipulate how or when this term expired. The Court agreed that this caused legal uncertainty and urged the legislature to remedy it. However, in the meantime, the Court declared Article 22(1)(d) to be conditionally unconstitutional unless given the following meaning: 'the term of office of the Attorney-General ends with the end of the president's term of office' (*Mahendra case*, 2010, p. 135). The Court reasoned that because the Attorney-General was appointed by the president, their terms should correspond.

13 See, for example, *MA Law No 2* (2004); *Book Banning* (2010); *General Election Campaign Advertising* (2008); and *Presidential Campaign Advertising* (2009) cases.

The *Supreme Court v Judicial Commission case* (2006) provides another example of the Court using legal uncertainty to invalidate statutory provisions that it deems to be unclear. As discussed in Chapter 4, Supreme Court judges challenged provisions of the 2004 Judicial Commission Law permitting the Commission to supervise Supreme Court judges 'to maintain their honour and dignity'.[14]

The Court ruled that these 'supervision provisions' caused legal uncertainty. In particular, the Law failed to detail how the Commission should supervise Supreme Court judges. For example, the Law did not cover fundamental issues such as how honour and dignity were to be assessed, or what constituted 'reviewable behaviour' (*Supreme Court v Judicial Commission case*, 2006, p. 193). Were judicial standards to be measured by reference to a code of conduct or ethics? If so, which code? (*Supreme Court v Judicial Commission case*, 2006, p. 193). This made the Commission's function unclear and confused judges about what ethically they could do; and this, in turn, could influence how they decided cases (*Supreme Court v Judicial Commission case*, 2006, p. 190). The Court stressed that, partly due to this uncertainty, the Commission had erroneously interpreted the Law to authorise itself to assess judicial behaviour by evaluating judicial decisions.

The Court's decision-making practices in these legal certainty cases has been criticised on several grounds.[15] One is that the Court has, in essence, intruded upon the jurisdiction of the Supreme Court and the courts below it. Inconsistencies between statutes and ambiguities are usually resolved, as a matter of course, by ordinary courts in Indonesia, as they are elsewhere, using principles of statutory interpretation.[16] However, rather than refer these disputes back to these ordinary courts, the Constitutional Court has intervened. Worse, when the Court has been faced with two inconsistent statutory provisions, it has not usually explained why it invalidated or declared conditionally (un)constitutional one of them rather than the other. Unfortunately, the impression left is of arbitrary decision-making.[17] In my view, the Court seems

14 These included Articles 20, 21, 22(1)(e), 22(5), 23(2), 23(3), 23(5), 24(1), 25(3), 25(4) and 34(3) of the 2004 Judicial Commission Law.

15 See Butt and Lindsey (2012) for full consideration of these criticisms.

16 A point made in several cases by the government and the DPR when defending the constitutionality of their statutes before the Court. For example, see *MA Law case* (2004, pp. 13–16).

17 This arbitrariness is compounded by several decisions in which the Court has refused to decide upon the validity of inconsistent statutes as against each other. See, for example, the *Taxation Court Law case* (2004).

to use the legal uncertainty ground to strike down laws that it dislikes, when no other constitutional ground appears readily applicable.

6.1 *2011 Amendments and the Court's Response*

The 2011 Amendments added Article 50A to the 2003 Constitutional Court Law, which prohibited the Court from using 'another statute as the basis for its legal considerations'. On my reading, Article 50A was clearly directed at the Court's 'legal uncertainty' decisions in which it invalidated provisions of one statute for contradicting those of another statute. However, Article 50A does not appear to capture the second category of cases in which the Court has employed the legal uncertainty ground: where a statutory provision is unclear, is subject to multiple interpretations, or contradicts another provision in the same statute.

The Court's justification in the *MK Law Amendment case No 2* (2011) for invalidating Article 50A was ambiguous, perhaps inconsistent. On the one hand, it denied that 'constitutional court decisions have [ever] used [other] statutes as a basis in their considerations' (*MK Law Amendment case No 2*, 2011, p. 75). Rather,

> in particular applications, the constitutional court is required to see statutes as part of a system which cannot contradict itself so that if the court finds that one statute conflicts with another statute, this will contravene legal certainty as guaranteed in the Constitution.
>
> *MK Law Amendment case No 2*, 2011, p. 75

Following this reasoning, invalidating Article 50A was unnecessary because, in the Court's view, it posed no obstacle to the Court's decision-making. Yet the Court declared that prohibiting the Court from using other statutes as part of its legal arguments:

> reduced the authority of the Court in exercising its judicial powers to uphold the law and justice [and that] comparing statutes…creates legal certainty as required by Article 28D(1).
>
> *MK Law Amendment case No 2*, 2011, p. 74

7 Government Policy

As discussed in Chapter 4, the Court has proclaimed that it will not invalidate legislation that remains within the 'corridor of constitutionality'. However,

in several cases, the Court has been accused of interfering with legitimate government policy choices (Butt and Lindsey, 2008). This it has done primarily by invalidating statutory provisions for violating Article 33 of the Constitution. There is also scope to argue that these decisions see the Court imposing a relatively narrow 'corridor' through constitutional interpretation rather than interfering in government policy. Either way, the Court's reasoning has been questionable and indicates that, generally speaking, the Court is poorly equipped to adjudicate matters involving complex socio-economic variables.

Articles 33(1)–(3) of the Constitution require that the economy be structured as a 'common endeavour' and that the state control both natural resources (to ensure the 'greatest prosperity of the people') and sectors that provide the necessities of life. The Constitutional Court has been asked to consider the extent to which Article 33 permits private sector involvement in important industries, such as electricity generation, and in the extraction and exploitation of natural resources, including oil and natural gas, forests, estuaries and water.

In the first of these cases – the *Electricity Law case* (2003) – the Court decided that the 2002 Electricity Law, which sought to loosen the state's electricity-sector monopoly by opening it to private ownership and involvement, fell foul of Article 33(2). As mentioned, the Court invalidated the entire statute, because the government had relinquished the level of state control required by Article 33(2). In reaching this conclusion, the Court interpreted 'state control' to comprise five activities: making policies, administering, regulating, managing and supervising the sector.

Yet, as mentioned in Chapter 3, there were good policy reasons for the government allowing – indeed, encouraging – private sector participation in the electricity sector. For example, when the Law was enacted, around 35% of Indonesians had no access to electricity and most who did had an unreliable supply. The Indonesian National Electricity Company (*Perusahaan Listrik Negara*) had admitted that it could not meet Indonesia's electricity demands without private sector investment (Venning, 2008, pp. 117–18). Further, with the Indonesian economy on the brink of collapse in 1997–1998, the International Monetary Fund (IMF) offered Indonesia a financial bailout package, made conditional upon Indonesia introducing structural reforms. One of these was reducing government monopolies, including in the electricity sector, to increase competition. The 2002 Electricity Law was enacted, at least in part, to meet these 'conditionalities'.

Unsurprisingly, then, the Court's decision was not well received by members of the legislature and the executive. This reflected concerns, which abound worldwide, about the views of elected bodies being displaced by a few judges,

'notoriously ill-equipped to evaluate options and choices on some issues, such as socio-economic policies with important financial implications' (Sadurski, 2005, p. xiii). Indonesian politicians directed strong criticisms at the Court along these lines, including that the Constitutional Court had insufficient expertise to decide matters of economic policy, lacked democratic legitimacy to invalidate the statutes of a 550-member elected parliament, and had impeded Indonesia's meeting of its electrification targets and IMF conditionalities.

By contrast, in the *Water Resources Law case* (2005), a majority upheld the constitutionality of the 2004 Water Resources Law, finding that it did not relinquish government control over water resources. The Law, the judges said, had merely enabled the state to grant to private sector entities a right to exploit water resources, primarily to provide drinking water and irrigation services. The government had retained power to make policy and regulations, manage water resources, and grant permits for water exploitation.

The *Water Resources Law case* (2005) might be decided differently today, particularly if the Court were to follow its decision in the more recent *BP Migas case* (2012).[18] In that case, a majority of the Court built upon the *Electricity Law* (2003) decision, dividing the five activities constituting state control into three 'levels' based on their importance. Direct management over the natural resource was 'the most important first order form of state control' (*BP Migas case*, 2012, para [3.12]). Both policymaking and administration were second, followed by regulation and monitoring.

The majority explained that direct management was the most important of these activities because it ensured that all profits flowed to the state, thereby bringing more 'prosperity to the people'. Handing over management to the private sector meant sharing profits. The private sector could, therefore, be permitted to participate in direct management, and the other activities of control, only if the state lacked the capacity to engage in those activities itself. The Court found that the state agency running the oil and gas sector in Indonesia, BP Migas (*Badan Pelaksana Kegiatan Usaha Hulu Minyak dan Gas*), had contracted with the private sector to perform this function rather than directly managing the sector itself. Deciding that this breached Article 33(3) of the Constitution, the Court removed all references to the agency from the 2001 Oil and Natural Gas Law, thereby disbanding BP Migas with immediate effect.

This decision was welcomed by many, including nationalists and others uncomfortable with foreigners profiting from Indonesia's national resources. However, it also prompted a deluge of criticism, raising several further

18 This description draws on Butt and Siregar (2013).

questions about the Court's capacity to decide complex matters of economic policy and the quality of its decision-making (Butt and Siregar, 2013).

First, the Court in the *BP Migas case* (2012) explained neither why state control comprises these five activities, nor where it derived this interpretation of state control.[19] The Court also did not recognise the considerable overlap between the five activities. For example, regulation partly encompasses policy-making (for how can one regulate without first deciding upon what to regulate?) and effective management necessarily incorporates some administration and supervision.

Second, the Court did not explain how it 'ranked' the five activities. It is unclear why, for example, the Court prioritised direct management over regulation. Surely tight regulation, matched by strict supervision and enforcement, can constitute 'control' and result in specified profits being returned for the people. As Afghani (2013) argues, the Court's failure to recognise the relative importance of regulation ignores:

> contemporary mainstream academic understanding of regulation [as including] supervisory activities, as well as license-granting, standard-setting, in addition to the traditional understanding of enacting rules.

Third, while the Court declared that private sector participation in direct management was permissible only if the state lacked the capacity to manage the sector itself, the Court did not then determine whether the state was, in fact, capable of doing so. Clearly, the majority presumed that it was. However, many observers have disagreed with this assessment. In dissent, Justice Harjono touched upon this point, opining that the executive and legislature knew more than the Court about whether the state had the capacity and capital to directly manage the sector.

Finally, the Court did not explain why state management would lead to more profits for the people than would private sector participation. In particular, the Court did not consider whether private sector investment and involvement in the oil and gas industry might create greater prosperity for the people than if the government directly managed it. As Justice Harjono pointed out, the oil and gas sector is high risk, requiring significant capital and capacity. Private sector involvement and competition in upstream activities might lead to exploration and exploitation that the state alone could not achieve. The result could be profits or other benefits that, even if split between industry participants and the state, would exceed those that the state would have

19 Though for a convincing attempt to identify the source of these activities, see Afghani (2013).

obtained had it directly managed the activities. Besides, considering whether private sector involvement impedes the 'greatest prosperity of the people' is surely a matter of the 'effectiveness' of government policy, something the Court has said that it should not assess.[20]

8 Interim Emergency Laws (Perpu)

Article 22 of Indonesia's Constitution permits the President to issue Interim Emergency Laws (*Peraturan Pemerintah sebagai Pengganti Undang-undang* (Perpu), literally Government Regulations in lieu of a Statute) 'in pressing emergency circumstances' (*dalam hal ihwal kegentingan yang memaksa*).[21] According to Article 22, Emergency Laws have the same legal authority as ordinary statutes, but remain in force for a limited time. To remain valid, they must be ratified by the DPR during its next sitting. If the DPR ratifies them, they are converted to statutes. If the DPR rejects them, they become invalid.

The Constitutional Court has had to grapple with two primary issues concerning Perpu. The first is a threshold issue: whether the Court can review them given that they are formally not statutes (*undang-undang*). The second is whether the president has absolute discretion to determine whether a situation is 'pressing', thereby enlivening Article 22 to allow him or her to issue a Perpu.

Surprisingly, the Court ignored the threshold issue in the first case in which it was asked to review a Perpu: the *Forestry Law case* (2005). (Clearly, the Court presumed that it had jurisdiction to review a Perpu, because it did precisely that.) Instead, the Court focused exclusively upon the second issue, holding that the President could subjectively determine whether a pressing situation exists. The Court could not, therefore, examine whether the president's assessment of a situation as an 'emergency' was correct and then invalidate the Perpu if it was not. Whether the matter was in fact 'pressing' was something for the DPR to consider at its next sitting, when deciding whether to endorse the Perpu. However, the Court made the following suggestion to the President:

> In the future, the President's reasons for issuing an Interim law should be more strongly based on the objective conditions of the nation and state and reflected in the [Preamble] of the Interim Law in question.
>
> *Forestry Law case*, 2005, p. 15

20 See, in particular, the *KPK Law case* (2003), discussed in Chapter 4.

21 In this section, I refer to Interim Emergency Laws as 'Perpu' in both the singular and plural senses.

In subsequent cases, the Court has confirmed that it does, in fact, have jurisdiction to review Perpu and has gradually resiled from holding that the president's assessment is unreviewable.

8.1 Saor Siagian Case (*2009*)

The Court was again asked to review the constitutionality of a Perpu in the *Saor Siagian case* (2009). This was brought by a group of advocates who challenged a Perpu issued to amend the 2002 KPK Law, particularly its provisions about appointing replacement KPK commissioners.[22] The Court ultimately rejected the case for lack of standing. However, before reaching this decision, the Court squarely addressed whether it had power to review Perpu.

The Court observed that a Perpu could contain the same subject matter as a statute, and could also create new legal norms, relationships and consequences. Before the DPR convenes to decide whether to retain or reject it, a Perpu operates as if it were a statute. Given these similarities, Perpu could be equated with statutes. The Court held, therefore, that it has jurisdiction to review a Perpu before the DPR decides upon its fate (*Saor Siagian case*, 2009, para [3.13]).

In the *Saor Siagian case* (2009) the Court did not mention its discussion about Perpu in the *Forestry Law case* (2005). However, the Court departed from its views in that earlier case. Even though Article 22 of the Constitution gave the president the 'right' to issue Perpu, the Court held that the president did not have absolute power to determine subjectively whether a situation required immediate redress, thereby necessitating a Perpu. For the Court, there was also an objective component, encapsulated in the following three requirements:

1. A pressing situation exists – that is, a pressing need to quickly resolve a legal problem by issuing a statute.
2. The necessary statute does not exist, leaving a legal vacuum; or if the statute exists, it is insufficient.
3. The legal vacuum cannot be filled by enacting a statute using normal procedures because this will take a long time, whereas the pressing situation must be resolved with certainty (*Saor Siagian case*, 2009, para [3.11]).

Although the Court did not disclose the source of these three requirements, they appear to have come from a book written by Jimly Asshiddiqie

22 For more discussion of this controversy and the Perpu, see Butt (2012a).

while he was Chief Justice of the Court (Asshiddiqie, 2007, p. 282). That these three requirements came from Asshiddiqie is surprising given that the *Forestry Law case* (2005), which does not adopt them, was decided while he led the Court.

8.2 MK Perpu Case (*2014*)

The Court went further than *Saor Siagian* in the next case in which it reviewed an emergency law: the *MK Perpu case* (2014). As discussed in Chapter 3, this Perpu was issued after the arrest of then-Chief Justice Akil Mochtar in October 2013 for corruption. The Perpu sought, *inter alia*, to require all Constitutional Court nominees to undergo a fit and proper test administered by an Expert Panel before being appointed to the bench. It also altered the composition and organisation of the Constitutional Court Judge Honour Council – the body charged with examining alleged breaches of the Constitutional Court Code of Judicial Ethics.

The Court began its decision by confirming that it could review the constitutionality of Perpu because they were 'of the same level' as a statute[23] and by restating the three prerequisites established in *Saor Siagian.* The Court also reiterated that, even though the president could subjectively determine whether a particular situation justified of a Perpu, an element of objectivity was necessary. According to the Court,

> [t]he creation of a Perpu cannot be misused, remembering that the content of a Perpu is the same as a statute, which cannot be unilaterally decided by the President without the agreement of the DPR.
>
> *MK Perpu case*, 2014, p. 119

The Court found no objective basis for the Perpu being issued, and invalidated the entire Perpu, partly because the situation facing the President when

23 This appears to be a reference to Indonesia's 'hierarchy of laws' (*Tata Urutan Peraturan Perundang-undangan*), contained in Article 7(1) of the 2011 Lawmaking Law. The hierarchy is as follows:

a. The 1945 Constitution (*Undang-undang Dasar 1945*);
b. Decrees of the People's Consultative Assembly (*Ketetapan MPR*);
c. Statutes/Interim Emergency Laws (*Undang-Undang/Peraturan Pemerintah Pengganti Undang-Undang*);
d. Government Regulations (*Peraturan Pemerintah*);
e. Presidential Regulations (*Peraturan Presiden*);
f. Provincial Regulations (*Peraturan Daerah Propinsi*); and
g. County/City Regulations (*Peraturan Daerah Kabupaten/Kota*).

he issued the Perpu was not 'pressing'. The Court based this holding on several factors, including that the Preamble of the Perpu did not specify the 'emergency' the Perpu addressed. Also, even though the President had issued the 2013 Interim Emergency Law some months earlier, the Expert Panel had not yet been established, indicating that its regulation by Perpu had not in fact been pressing. Similarly, a Constitutional Court Judge Honour Council had not been convened under the Perpu; and in any event, the Court decided that convening the Council to hear the allegations against Mochtar was not an emergency (*MK Perpu case*, 2014, para [3.25]).

With respect, the Court's reasoning in the *MK Perpu* and *Saor Siagian* cases is dubious in two primary respects. First, the Court does not appear to have given due consideration to the constitutional implications of its reviewing Perpu. As mentioned, in these cases the Court justified reviewing Perpu on two primary grounds: they are of the same 'level' as statutes, and they have the same legal force as statutes. However, there are important differences between Perpu and statutes. Perpu constitute an exercise of legislative power by the president. By contrast, statutes – which the Constitution grants the Court exclusive jurisdiction to review – are produced by the legislature. And, importantly, the Constitution specifically gives the DPR power to 'review' Perpu when deciding whether to endorse or reject them. That the Court is expressly authorised to review legislation, but not president-made law, appears to be a fundamental aspect of the separation of powers as delineated in the Constitution. By reviewing Perpu, the Court appears to be breaching that separation. The DPR exercises its power by enacting a statute that endorses or rejects the Perpu. By reviewing Perda, the Court precludes the DPR from exercising this function. On this view, the Court should not intervene until the DPR determines whether to endorse or ratify the Perpu through its exercise of legislative power.

Second, even presuming that the Court should have jurisdiction to review Perpu, whether a situation is sufficiently 'pressing' to justify the president issuing a Perpu should not be judged with the benefit of hindsight, as the Court did in the *MK Perpu case* (2014). Rather, it should be assessed according to the conditions the president faced when the Perpu was issued. Whether the Perpu was, in fact, applied should be irrelevant to this assessment. Yet the Court appeared to attribute great weight to the Expert Panel and Honour Council not having been constituted quickly as one might have expected if their establishment was in fact an emergency. Factors of this kind are more properly assessed by the DPR when it considers whether to reject the Perpu or allow it to remain in force.

9 Implication of Rights

A third way in which the Court has arguably expanded its own jurisdiction, but which was not targeted in the 2011 Amendments is 'implying' constitutional rights (Butt, 2007a). As discussed, the Court has discovered and then enforced these rights against the state, even though they are not explicitly mentioned in the Constitution. In this endeavour, the Court appears to be following the example of other constitutional courts – particularly the South Korean Constitutional Court.

The Indonesian Constitutional Court has implied rights primarily by reference to Article 1(3) of the Constitution, which states that Indonesia is a 'law state' or a *negara hukum*, usually translated as 'rule of law'. For example, the Court has decided that a prerequisite to the *negara hukum* is due process, which itself requires several rights. One of these is the presumption of innocence. Even though this right is not expressly provided in the Constitution, the Court decided in the *Bibit and Chandra case* (2009) that it was implicit in the Constitution. Another is the right to a fair trial, which, according to the majority in the *Bali Bombing case* (2003, p. 38) encompasses:

> minimum [requirements] of procedural justice, including the presumption of innocence; equality of opportunity for the parties; announcement of the decision [which is] open to the public; *ne bis in idem*; the application of less serious laws for pending cases and the prohibition against retrospectivity.

These cases have not prompted debate amongst Indonesia's usually lively and vibrant legal community about the propriety of implying rights. In other countries, such as Australia, great controversy and debate has accompanied the implication of such rights. The thrust of objections to implying constitutional rights is that, had the drafters of the Constitution wanted such rights to be recognised and enforced, they would have specifically included them in the Constitution's text. The question then becomes whether, when it implies rights, a court is really enforcing the Constitution or rather the personal preferences of its judges.

For the most part, the Court has simply proclaimed the existence of these rights as though their coming into being, and their nature and requirements, are self-explanatory. The Court has neither explained how it arrived at these rights, nor precisely described them. Had it done so, the Court may have given clues about whether these rights might apply in future cases and whether

other rights might later be discovered using similar methods of reasoning or interpretation.

The Court has left many other crucial questions unanswered. For example, it has not explained the consequences of a breach of these process-related implied rights. If a trial is procedurally unfair, and no legal aid is provided or due process is ignored, will the final decision be invalid? Further, the Court has not explained how breaches of these implied rights can be enforced. While the Court can invalidate statutes that ignore such rights, most of the rights flowing from the *negara hukum* are breached in the daily practice of law, such as during trials, rather than in legislation. The Constitutional Court's implied rights decisions are, therefore, usually ignored because the Court lacks jurisdiction to review the constitutionality of government action and the judicial processes of other courts.

PART 3

Constitutional Challenges to Electoral Statutes

CHAPTER 7

Indonesian Elections

Systems, Laws and Scope for Challenge

As mentioned in Chapter 1, Indonesia's electoral system is complex. This is partly because post-Soeharto Indonesia has a myriad of representative institutions, and key executive positions, including the presidency, which are now filled by direct election. Voting is not mandatory in Indonesia. Most Indonesians, provided that they are aged 17 or above or married,[1] can vote every five years for: two national-level bodies – the national parliament (DPR) and the regional representative council (DPD); their president and vice-president; their provincial and their city or county parliament; and their provincial governor and their mayor or regent, depending on whether they live in a city or a county. Most of these elections are governed by different rules, though some share common features.

This Chapter provides an overview of these electoral systems and their development from 1999 – the year in which Indonesia's electoral system was overhauled after 33 years of authoritarian rule. The Chapter is not intended as a comprehensive description of these systems: this has been provided elsewhere (see, for example, Crouch 2010; Horowitz 2012). Rather, its primary purpose is to provide sufficient legal context for subsequent chapters of this book. It broadly introduces the constitutional and statutory rules governing these elections, the parties and individuals who can contest them, the institutions that administer them, and the institutions or government offices constituted through them. It focuses upon the elements of those systems that applicants – whether citizens, parties or other institutions – have contested before the Constitutional Court. It also discusses some of the constitutional challenges to the functions and composition of important institutions not covered in subsequent chapters – namely, the DPD, KPU and Banwaslu.

1 Constitutional Framework

Indonesia's Constitution contains only one provision solely dedicated to elections: Article 22E. The provision, added to the Constitution during the third amendment round in 2001, contains six paragraphs or subsections.

1 See Article 19 of the 2012 General Election Law and Article 27 of the 2008 Presidential Election Law.

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(1) General elections are to be direct, public, free, secret, honest, and fair, and held every five years.
(2) General elections are held to elect members to the DPR, DPD and the DPRD, and to elect the president and vice-president.
(3) Contestants of DPR and DPRD elections are political parties.
(4) Contestant of DPD elections are individuals.
(5) General elections are to be administered by a general election commission that is national, permanent and independent.
(6) Further provisions about general elections are to be regulated by statute.

Also fundamental is Article 1(2) of the Constitution, which establishes the 'sovereignty of the people'. Article 18, amended during the second round in 2000, covers regional government and touches upon elections for regional representative institutions and 'regional heads' in two of its paragraphs. Article 18(3) states that 'Provincial, county and city administrations have DPRDs whose members are chosen by general election'. Article 18(4) states that 'Governors, Regents and Mayors are heads of provincial, county and city governments respectively, and are to be elected democratically'.

Most of Indonesia's election-related statutes specify one or more of these provisions as their primary constitutional bases, and provide flesh to the skeleton framework established in them. Yet, as we shall see in subsequent chapters, the Constitutional Court has not always shared the DPR's interpretation of these constitutional provisions, relying upon Article 1(2), each paragraph of Article 22E, and Articles 18(3) and (4), to invalidate or 'modify' provisions of most, if not all, election-related statutes enacted since the fall of Soeharto.

2 Election-related Statutes and Regulations

The Court has, in many decisions, emphasised that these constitutional provisions give lawmakers considerable scope to establish any of a variety of electoral systems. Lawmakers can choose, for example, to use proportional representation, a plurality/majority system, or a mixed system, provided that elections remain direct, public, free, secret, honest, and fair, and are held every five years.[2] The DPR can also choose various prerequisites for candidacy and various thresholds for participation in elections, provided that these systems

2 However, as we shall see, the Court has not allowed parliament to choose between 'closed' or 'open' list systems, or something in between. For a description of various electoral systems, see Reynolds et al (2005).

remain within constitutional confines, including the various civil and political rights contained in Chapter 28 of the Constitution.[3] It can also choose how voting takes place, again as long as the chosen method does not contradict these provisions.[4]

At time of writing, the three main statutes governing elections for membership to representative institutions – the national Parliament (DPR), the national Regional Representatives Council, and regional parliaments (DPRD), both provincial and city/county – were:

- The 2012 Law on General Elections for Members of the DPR, DPD, and DPRD ('2012 General Election Law'): Law 8 of 2012, replacing Law 10 of 2008, replacing Law 12 of 2003.
- The 2009 Law on the Organisation and Position of the MPR, DPR, DPD and DPRD ('the 2009 Representative Institutions Law'): Law 27 of 2009, replacing Law 22 of 2003.
- The 2008 Law on Political Parties ('the 2008 Political Parties Law'): Law 2 of 2008, as amended by Law 2 of 2011, which replaced Law 31 of 2002.

Challenges to these statutes are the focus of Chapter 8 of this book.

For presidential elections, the governing statute is the 2008 Law on the Election of the President and Vice-President ('the 2008 Presidential Election Law'): Law 42 of 2008, replacing Law 23 of 2003. Constitutional Court cases about presidential elections are discussed in Chapter 9. Despite attempts to abolish them, regional head elections (*Pemilukada*) remained regulated by Law 32 of 2004 on Regional Government ('the Regional Government Law'). These are discussed later in this Chapter and in Chapter 10.[5]

Lower-level regulations, particularly those issued by the KPU, also affect how elections are conducted. Many contain detailed operational rules to be

3 *Parliamentary Threshold case* (2009), cited in *Parliamentary Threshold and Party Verification case* (2012, p. 96).

4 The Constitutional Court has, for example, held that e-voting is a constitutionally-valid method of voting, provided that: the mechanism complies with Article 22E; it is technologically sound, well-funded, supported by software and staff; and the community is 'ready for it' (*E-voting case*, 2009, p. 41).

5 Other national legislation touches on elections in particular regions but is not covered in this book. See, for example, the 2003 Law on the Formation of the County of West Sumbawa. Some regional regulations also govern the conduct of elections. See, for example, Qanun [Regional Regulation] of the Province of Nanggroe Aceh Darussalam 4 of 2006 on Financial Assistance for Political Party Participants in the 2004 Elections that Obtain a Seat in the Provincial DPRD.

followed by officials before, during and after these various elections. This book does not cover these regulations, except for the KPU Regulation at issue in the *Sisa Suara case* (2009).

2.1 *Statutory Evolution*

Before turning to discuss Indonesia's electoral systems and institutions, it bears noting that every post-Soeharto national parliament has replaced or amended most, if not all, statutes governing elections for representative institutions and the presidency, while retaining their names. The regular changes have created inconsistencies and caused great confusion amongst citizens, government and even electoral institutions, exacerbated by the numerous constitutional challenges brought by individuals, political parties and institutions to aspects of electoral statutes that adversely affect them.

Politicians often explain these changes as necessary to simplify the electoral or party system and reduce the number of parties in parliament, often citing the difficulties multi-plurality presents for decision-making.[6] Commentators, on the other hand, point out that most of these changes appear directed towards entrenching the larger political parties, helping them secure seats in future elections, and even increase their share, while reducing competition from smaller parties.

For its part, the Court has criticised lawmakers for 'always experimenting' with Indonesia's electoral systems, claiming that lawmakers 'lack a clear design for the simple party system they seek to create' (*Parliamentary Threshold case*, 2009, para [3.20]).[7] As Justice Siahaan stated in the *Parliamentary Threshold case* (2009, p. 134):

> one cannot resist the strong impression that temporary interests are having a strong influence on the policies that are created…'Highly situational pragmatism' must be avoided…[which results] in the constant changing of policy on the whim of decision makers.

6 Sherlock (2009, p. 11) argues, however, that these concerns are largely unfounded because in both the 2004 and 2009 elections, 90% of voters supported the six or seven parties that obtained seats in parliament. Smaller parties thus have little impact. Nevertheless, accommodating the interests of six or seven parties still represents a significant impediment to lawmaking, requiring parties to join in coalitions to make decisions.

7 See also Justice Mochtar's dissent in *Parliamentary Threshold and Party Verification case* (2012), in which he criticises the legislature for changing the electoral rules before every election.

Perhaps the most dramatic statement conveying the Court's frustration about the constant changes and challenges to these electoral statutes is in the *Saurip Kadi case* (2008), one of many cases about the presidential nomination threshold, discussed below:

> How horrible are the social and economic burdens that the people and state must bear as a result of the explosion of constitutional problems, such as the number of parties from election to election without a clear legal design for the development of the party system in Indonesia. This is worsened by…individual freedoms, the concept of which has been accepted…without considering the context, whether local or international. The time has come not to be trapped by freedom without limits, where everything is permitted. This type of democracy is democracy that does not make the people prosperous or happy…Some of the reforms, including those which emphasise individual reforms and have led to the very problematic party system, are leading to 'bad' democracy (p. 180)… Everywhere people are shouting democracy, but what is happening is anarchy.
>
> p. 181

Despite these strong protestations, the Court has consistently held that the national legislature is constitutionally entitled to change the electoral system whenever and however it likes, provided that the changes are constitutional (*Parliamentary Threshold case*, 2009, para [3.19]). In this context, the Court has specifically rejected the argument that amending or replacing electoral laws in the lead-up to elections breaches the constitutional right to legal certainty:

> The amendment of a statute cannot be taken to constitute uncertainty in the political system and does not cause legal uncertainty. Whether legal uncertainty exists is determined by reference to the substance of the statute.
>
> *Parliamentary Threshold and Party Verification case*, 2012, p. 53

Nevertheless, it is possible to speculate that the Court might, in future, find constitutional fault with an electoral statute enacted so soon before an election that it makes organising and running that election too difficult, or impossible, for the KPU. As discussed in Chapter 9, in several decisions the Court has invalidated provisions of electoral laws but then suspended its invalidation until after coming elections, particularly if the KPU has already begun organising it. The Court has emphasised the considerable logistical difficulties that

organising and running elections present for the KPU, understanding that requiring immediate compliance might derail those elections.[8]

2.2 *Explaining Multiple Challenges to Similar Norms*

Indonesia's various electoral laws have been amongst those most regularly challenged before the Court. Yet many challenges are brought on similar, if not identical, grounds. There are several reasons for these numerous and similar challenges, three of which I discuss here.

First, much is at stake, with these laws shaping the configuration of political power in Indonesia, whether national, provincial or more local. Many political parties and politicians have the financial resources to lodge these applications. They therefore have little to lose from challenging electoral laws that could prevent them from obtaining parliamentary seats, even if their prospects of victory are slim. Likewise, individual citizens excluded from competing because of candidacy requirements have much to gain from a successful constitutional challenge to those requirements. Both the costs and potential spoils of obtaining political office in Indonesia are often large, usually dwarfing the expense of bringing constitutional challenges.

Second, Article 60 of the 2011 Amendments to the 2003 Constitutional Court Law declares that a provision or part of a statute that the Court has already reviewed cannot be reviewed again unless against a different constitutional provision. Thus, the Court will usually throw out, on *ne bis in idem* grounds, applications that seek review of a statutory provision against constitutional provisions already considered in a previous case. However, because most of Indonesia's electoral laws are replaced every five years or so, parties and candidates have been able to seek a review of rules that carry over in each iteration of these statutes. As we will see in subsequent chapters, challenges to these similar rules are often lodged again as new laws or amendments are enacted.

Third, the Court's decisions about aspects of one electoral system do not usually automatically apply to another electoral system. This point is perhaps best illustrated by example. As discussed in Chapter 8, in the *PKI case* (2003), the Court invalidated a provision in the 2003 General Election Law prohibiting former members of banned political parties from standing for election to the national legislature. However, the same prohibition was not thereby removed for candidates seeking to run in other types of elections, even though the same constitutional arguments for invalidity apply. Indeed, the same prohibition that the Court struck down in the *PKI case* (2003) was subsequently

8 See for example, the *Simultaneous Elections case* (2013), discussed in Chapter 9.

imposed for presidential candidates in Article 5(q) of the 2008 Presidential Election Law.

Separate challenges will, therefore, usually be necessary for each type of election. Unfortunately, some applications seeking to have the Court's decisions about one type of election translated to another have been thwarted by lack of standing. For example, in the *Christian Party case* (2009), the applicants asked the Court to consider the constitutionality of prohibitions imposed by the 2008 Political Parties Law upon political parties following communist teachings. While the issues appeared to resemble those in the *PKI case* (2003) and a similar decision might have been expected on the merits, the Court refused to entertain the applicants' arguments, throwing out the case because the applicants themselves did not represent a party with that philosophy and thus lacked standing (*Christian Party case*, 2009, p. 70).

3 DPR and DPRD Elections

The national parliament (*Dewan Perwakilan Raykat*, or DPR) is Indonesia's primary legislative institution. It has 550 members and consists entirely of elected representatives, unlike during the Soeharto period and some of Soekarno's reign, when the government appointed many members, including from the military. Perhaps the DPR's most important function is deliberating and enacting statutes. Once the DPR passes them, the President is to sign them into law (see Article 20 of the Constitution).[9] The DPR also performs 'budgetary and oversight functions' (Article 20A(1)). These include reviewing executive action, holding the President and ministers to account for their performance, and making appointments to key institutions, often after subjecting candidates to a fit and proper test.[10]

As mentioned in Chapter 4, when Indonesia embarked upon decentralisation or 'regional autonomy' (*otonomi daerah*) under statutes enacted in 1999,[11] significant powers and responsibilities were devolved from the central government to subnational governments. In 2014, these comprised 34 provinces

9 Even though the Constitution states that the DPR and President are to discuss and 'jointly approve' Bills (Article 20(2)), the President cannot refuse to assent to a DPR-approved Bill. If the President does not sign a Bill approved by the DPR within 30 days, the Bill automatically passes into law (Article 20(5)).

10 For a more detailed discussion of the function of the DPR and the rights and obligations of its members, see Butt and Lindsey (2012, pp. 62–64).

11 1999 Regional Government and 1999 Fiscal Balance Laws.

(*propinsi*) and over 500 counties (*kabupaten*) and cities (*kota*),[12] all of which had legislative and executive governments. Each provincial parliament contains between 35 and 100 seats, depending on the population of the province, and each city and county legislative assembly has 20 to 50 seats (Article 23(1) of the 2008 General Election Law). The lawmaking powers granted to these subnational legislatures and executives are broad, including to enact regulations and issue binding decisions on virtually any matter, save those reserved by statute for the central government (Article 18(5) of the Constitution): foreign affairs, defence and security, national monetary and fiscal matters and religion (Article 10(3) of the 2004 Regional Government Law).[13]

3.1 *The List System*

Indonesia has traditionally employed a proportional system for legislative elections, whether national or subnational.[14] It has gradually transitioned, through various legislative amendments and Constitutional Court decisions, from a closed-list system to an open one similar to that used in countries such as Brazil, Denmark, Chile, Finland, the Netherlands and Sweden (Junaidi and Della-Giacoma, 2014a). Indonesia's first post-Soeharto election in 1999 employed a 'closed-list' system under which voters could not vote for particular individuals. Rather, they could only choose a party (Article 1(7) of the 1999 General Election Law). If that party received sufficient votes to obtain a seat, then the party could freely choose which of its candidates would represent the party in parliament, provided they met various statutory candidacy requirements. The parties ranked their preferred candidates on a list (*daftar calon*), and seats were awarded to candidates placed highest on the list.

This system was widely criticised for motivating candidates to prioritise close relations with the central party leadership rather than:

12 By contrast, when Indonesia commenced decentralisation, it had less than 300 subnational governments. This number steadily increased as various provinces, cities and counties split and merged through a process called *pemekaran* (Booth, 2011). Counties and cities are the same 'level' of government, distinguished primarily by their size and population density: Article 1(4)(5) of the 2004 Regional Government Law.

13 For more details about the relative jurisdictions of subnational governments, jurisdictional overlaps and the legal ramifications of regional autonomy more generally, see Butt (2010) and Butt and Parsons (2014).

14 The architects of the 1999 election laws had proposed a first-past-the-post system – the single-member district plurality voting system – but for various political reasons the parties could not agree upon it and the pre-existing proportional system was maintained (Shin, 2013, p. 108).

> the constituents they were supposed to represent. It led to…candidates paying the party for a winnable position on the party ticket. A party with a strong following in a particular district could charge a high price for the position, and the candidate received the comfortable assurance of winning a parliamentary seat without the effort of campaigning. This was a way for parties to raise funds and for wealthy individuals with little or no profile in a district to enter the DPR. Such practices tended to attract candidates seeking to buy influence, business connections and lucrative contracts, while neglecting the duties of parliamentary representation.
>
> SHERLOCK, 2009, p. 5

By contrast, the 2003 General Election Law adopted an 'open-list' proportional system (Article 6(1)), allowing voters to choose a particular candidate from a party or simply to vote for a party. An individual candidate would automatically receive a seat if the number of votes he or she obtained met the 'seat quota' in a given electoral district.[15] (The 'seat quota' concept is discussed later in this Chapter and in Chapter 8.) The party could then use the votes obtained by individuals who did not meet this quota, along with the votes cast for the party, to allocate seats to its preferred candidates by reference to its party candidate list. However, as Sherlock observes, this system also had significant drawbacks:

> [T]he details of the system meant that voter choice was largely illusory. If a voter failed to mark both candidate and party the vote was declared invalid, and the method of counting individual votes meant that only two candidates were actually allocated a seat in the 2004–2009 DPR on the basis of his [*sic*] personal vote. The reformed system still meant that candidates could not be elected without the endorsement of the party heavyweights in Jakarta.
>
> SHERLOCK, 2009, p. 5

For the 2009 elections, the 2008 General Election Law allowed voters to choose an individual candidate, a party, or both (Article 214(a–e)). The Law largely resolved the 'invalidity' problem of 2003: citizens could vote for an individual candidate without also selecting the candidate's party. Changes were also made to the seat quota for individual candidates. If an individual received 30% of the votes required for a seat in a given electoral district, the party had to allocate to that candidate any seats it obtained. (As mentioned, in the 2003 elections,

15 See Article 107 of the 2003 General Election Law.

candidates had to meet 100% of the quota to guarantee themselves a seat.) If none of a party's candidates met this reduced quota, then the party's choice would prevail – that is, seats would be allocated to candidates based on their position on the candidate list (Sherlock, 2009, p. 6). However, the Constitutional Court has made party lists obsolete. The Court held, in a 2009 case, that voters, rather than political parties, should decide which candidates are elected. This is discussed in Chapter 8. Seats must, therefore, be allocated to candidates obtaining the most votes rather than those placed higher on party candidate lists.

3.2 *Affirmative Action*

Women comprised only 8% of members of the DPR constituted from the 1999 elections (Sherlock, 2009, p. 14). Indonesia's electoral laws have since attempted to increase female participation in legislative elections. One of the means chosen has been to require parties to include amongst their candidates a minimum percentage of females. (As discussed in the Verification Requirements section below, the Political Parties and General Elections Laws have also sought to ensure female representation on party executives.) The 2003 General Election Law first introduced these quotas, though they were aspirational rather than mandatory. Article 65 merely required that parties 'consider' (*mempertimbangkan*) having candidate lists containing at least 30% women. This did little to improve female representation, with only around 11% of DPR members elected in 2003 being women.[16] As Ulu (2010, p. 8) explains:

> On the one hand, women [had] gained the opportunity for increased representation in parliament, but on the other hand, they were dependent on men who dominated political party structures for the system to be adopted.

The 2008 General Election Law appeared to make the 30% quota mandatory, declaring that 'candidate lists…are to contain at least 30% female representatives' (Article 53). It also required that for every three candidates on the list, at least one must be a woman (Article 55(2)). However, no sanctions, such as ineligibility to contest the election, were provided for non-compliance (Ulu, 2010, p. 9). The Law directed the KPU to verify that the quota was met, but stated that, if it was not, the KPU was to return party documents to the party concerned which should then 'correct the list' (Articles 57(3), 58(1) and 58(2)). The only action the KPU could take if the party did not comply was to publicly

16 See www.kpu.go.id.

announce the proportion of female candidates put forward by that party (Article 61(1)). Presumably, this was intended to 'shame' the parties into compliance.[17] The 2012 General Election Law contains similar provisions.[18]

The Constitutional Court further weakened these affirmative action initiatives – perhaps even thwarted them entirely – when it decided, in the *Open List case* (2008), that parties could not allocate the seats they win according to their party lists. Rather, the candidates obtaining the most votes were to be allocated seats, regardless of their position on the list. This and related decisions are discussed in Chapter 8.

The DPR has also enacted statutes to encourage increased female representation in important electoral institutions, including within national and regional KPUs. Again, the Constitutional Court has undermined these efforts. Even though Article 6(5) of the 2011 Electoral Administration Law states that 30% of KPU members should be female, the Constitutional Court has held that this is not an absolute requirement. In the *KPU Female Member case* (2013), the Court decided that Article 6(5) merely required that, if a woman meets the selection criteria for the position, has the same qualifications as a male candidate, and no women have been appointed to the relevant KPU, then that woman should 'have priority'. The Court declared, with little explanation, that affirmative action

> could not be forced without considering the ability of the woman in question, because if [affirmative action] is applied without taking capacity into account, this fails to uphold the dignity of women – the primary purpose of affirmative action – and can actually have the opposite effect.
>
> *KPU Female Member case*, 2013, p. 20

According to the Court, KPUs could perform their tasks only if their officials were competent, capable, had integrity and understood the civil and political rights of citizens.

3.3 *Seat Allocation*

Whether a party contesting a legislative election wins a seat in parliament depends on whether it obtains enough votes to meet the seat quota or 'BBP' (*Bilangan Pembagi Pemilu*, literally 'Vote Division Number'). This quota is determined by dividing the number of valid votes cast in an electoral district

17 Despite these inadequate provisions, the proportion of females in the DPR increased to 18% after the 2009 elections (www.kpu.go.id).

18 See Articles 55, 58(1), 58(2), 59(1) and (2).

by the number of seats allocated to that district.[19] Each time a party meets that quota it is awarded a seat. Of course, not all seats will be filled in this first phase: some parties will not receive enough votes to meet the quota; others will obtain seats, but their 'leftover' votes will be insufficient to obtain another seat. Leftover seats were allocated to the parties with the most surplus votes in the 2004 election (Ananta, Arifin and Suryadinata, 2005, pp. 28–29) and in a three-stage process from 2009. The Constitutional Court has issued important decisions about the way these 'leftover votes' are allocated. This three-stage process and these cases are discussed in Chapter 8.

Of great importance is that, for national elections at least, the seat quota is determined using the 'valid' votes cast. Only the votes for political parties or their candidates that obtain a minimum percentage of the nationwide vote are considered valid. Parties that fail to obtain this minimum percentage – the so-called 'parliamentary threshold' – are allocated no DPR seats, even if they meet the seat quota in an electoral district. For the 2014 General Elections, the parliamentary threshold was set at 3.5% of the national vote,[20] up from the 2.5% threshold employed in the 2009 elections, which was the first election in which such a threshold was used.[21] By contrast, seat allocation for provincial and city/county parliaments is not subject to a parliamentary threshold. This means that a party can hold a seat in a regional parliament if it meets the seat quota in the relevant electoral district. As we shall see in Chapter 8, the Constitutional Court has considered the constitutionality of this threshold for the DPR and DPRDs on several occasions.

3.4 *Establishment and Verification*

Since 1999, political parties wishing to participate in elections have needed to meet requirements imposed in the Political Parties and General Election Laws. These statutes have prescribed various prerequisites for establishing a political party, including having a minimum number of founders and articles of association evidenced by notarial deed. Under the Political Parties Laws, parties have also needed to meet various verification requirements – including having charters or offices in Indonesia's provinces, cities and counties – to be recognised as a legal entity by the Department of Justice. The General Election Laws then establish further conditions that verified parties must meet to become 'election participants' (*peserta pemilu*). These include having minimum levels of support and representation across Indonesia, and female representation in

19 See, for example, Article 13 of the 2003 General Election Law.

20 Article 208 of the 2012 General Election Law.

21 Article 202 of the 2008 General Election Law.

party executives. Importantly, the General Election Laws have made it easier for parties that contested the previous election to compete in the next election – at least if in the previous election they obtained a minimum specified percentage of seats in the DPR. The KPU is responsible for verifying that parties meet these requirements.

Minimum levels of female representation were also required for a party to be recognised as a legal entity. Article 2(1) of the 2008 General Election Law required that at least 30% of a party's founders and its national executive be female. Articles 3(1) and 8(1)(d) specified that a party would not be recognised unless it met these requirements. The 2011 Political Parties Law (Articles 2(2) and 2(4)) and the 2012 General Election Law (see Article 8(2)) contain similar requirements.

Recognition and verification requirements have, for the most part, become more onerous with each change to the Political Parties and General Elections Laws. For example, the 2002 Political Parties Law required parties to demonstrate that they had regional chapters in 50% of all Indonesian provinces, 50% of all counties/cities within those provinces, and 25% of the sub-districts within those counties/cities (Article 2(3)(b)). However, by 2011, a new party had to be represented in all provinces, in 75% of counties/cities within those provinces, and in 50% of sub-districts within those counties/cities (Article 3(2)(c)).

As mentioned, many commentators regard tightening these requirements as an attempt by larger parties to prevent smaller parties from emerging to compete against them. This has in fact occurred. With one exception, the number of political parties qualifying to contest national legislative elections has steadily decreased. In 1999, 48 parties participated; in 2004, 24 participated; in 2009, 34 (of 60 that applied); and in 2014, just 12 (out of 46) (Chen and Priamarizki, 2014).[22]

4 DPD Elections

The Regional Representatives Council (*Dewan Perwakilan Daerah* (DPD)) was established in the third amendment to Indonesia's Constitution in 2001.

22 In 2009, there were widespread reports of political parties seeking to evade these regional representation requirements, renting offices in various provinces, counties and cities during the verification period of around three months and then abandoning them afterwards (Jakarta Post, 2012). These reports, if correct, could explain why, in 2009, the number of parties contesting the election was significantly higher than in 2004 and 2014.

Its primary function is representing regional interests (*DPD Domicile case*, 2008, p. 204; *DPD Jurisdiction case*, 2012, p. 242). It can introduce, and help deliberate, bills concerning regional autonomy; the relationship and financial allocations between the central and subnational governments; the creation, splitting and merging of regions; and the management of natural resources and other economic resources (Articles 22D(1) and (2) of the Constitution). The Constitution also entitles the DPD to give advice (*memberikan pertimbangan*) to the DPR about draft budgets and bills concerning taxation, education and religion. Finally, the DPD can monitor the implementation of various statutes relevant to regional autonomy and can report its findings to the DPR 'as matters to consider for follow-up' (Article 22D(3) of the Constitution).[23]

4.1 *The* DPD Jurisdiction Case (*2012*)

The DPD's constitutional powers are not nearly as wide as the DPR's. This was underlined by the Constitutional Court in the *DPD Jurisdiction case* (2012), bought by the Chairperson and two Deputy Chairpersons of the DPD. They claimed that the 2009 Representative Institutions Law and the 2011 Lawmaking Law contradicted the constitutional provisions outlining the DPD's role in the national legislative process. Both statutes gave the DPR and the President power to introduce bills. By contrast, the DPD could not do this. The DPD could only submit bills via the DPR, which could refuse to introduce them (Articles 147(1) and (3)). If the DPR proceeded, the bill was formally treated as if introduced by the DPR, rather than by the DPD (Article 147(4) of the 2009 Representative Institutions Law; Article 43(2) of the 2011 Lawmaking Law). The DPR would then take carriage of the bill, deciding whether to include it in the DPR's legislative agenda (Articles 21(1) and (3) of the 2011 Lawmaking Law), and controlling its deliberation. These two statutes also required the DPR to include the DPD in deliberations on laws relating to regional autonomy (Article 71(2) of the 2009 Representative Institutions Law) and to consider the DPD's views (Article 71(e) and (f) of the 2009 Representative Institutions Law). However, the DPR did not need to accommodate the DPD's views. Rather, the DPR was merely required to forward the DPD's advice to the DPR committee deliberating on the bill (Article 154(5) of the 2009 Representative Institutions Law).

The applicants argued that making the DPD's participation in the legislative process largely subject to the DPR's discretion was unconstitutional. They argued that Article 22D(1) of the Constitution required that the DPD be 'treated the same' as the president and the DPR in introducing, deliberating and voting

23 For more detailed discussion about the DPD, see Butt and Lindsey (2012, pp. 64–65).

on, and providing input into bills about the subject matter mentioned in Article 22D (*DPD Jurisdiction case*, 2012, pp. 239–40).

The Court agreed that the Constitution entitled the DPD to introduce bills and that the impugned statutes undermined this by treating bills initiated by the DPD as bills of the DPR. The Court's objection here appeared to be that these provisions impeded the DPD's right to directly introduce legislation, though the Court did not expressly make this point. The Court also agreed that the DPD had a constitutional right to participate in deliberating (*ikut membahas*) on bills relating to regional autonomy and other matters specified in the Constitution. For the Court, the term 'ikut membahas' left no discretion for the DPR to exclude the DPD. The Court held that the DPD must be included from the:

> commencement of Stage I deliberations by a commission or special committee of the DPR – that is, from the delivery of the introduction and deliberation of the Inventory of Issues (*Daftar Inventaris Masalah*) and the delivery of 'mini opinions' (*pendapat mini*) at the end of the Stage I deliberations. The DPD must then be able to convey its opinions during Stage II deliberations in the DPR's plenary session up until the approval stage.
>
> *DPD Jurisdiction case*, 2012, p. 246

The Court also accepted that the DPD should play a role in devising the national legislative program (Prolegnas).[24] This was a necessary implication of Article 22D(1) of the Constitution, which, as mentioned, entitles the DPD to put forward bills concerning specified issues. Article 22D(1) would be meaningless unless the DPD helped determine the Prolegnas, because bills not included in the Prolegnas were not usually prioritised for deliberation.

The Court held that these provisions had reduced the DPD's constitutional powers and needed to be 'repositioned as intended by the Constitution'. The Court invalidated some of them and declared others conditionally unconstitutional, making extensive 'amendments' to both statutes.

However, the Court rejected the applicants' contention that excluding the DPD from voting on bills was unconstitutional. The Constitution gave the DPD no power to vote on bills. Article 20(2) of the Constitution referred only the DPR and the president having this function. The Court also disagreed that Article 22D(2) of the Constitution required the DPR and president to follow

24 This is a list of statutes which the government and the legislature agree should be enacted in a given year (Butt and Lindsey, 2012, p. 74–75).

the views expressed by the DPD. For the Court, Article 22D(2) would be satisfied if the president and DPR merely sought the DPD's views on budget drafts and bills on taxation, education and religion.

4.2 *DPD Elections*

As mentioned, the Constitution requires that DPR and DPRD elections be contested by political parties (Article 22E(3)). This means that independent candidates cannot stand in them (a matter discussed in later chapters). By contrast, only individuals can contest DPD elections, with four seats allocated to each of Indonesia's provinces. DPD elections are more straightforward than Indonesia's other elections. Voters simply choose one candidate from a list. The four candidates obtaining the most votes in the electoral district in which they stand obtain seats.

While candidates must meet the same prerequisites as DPR members in terms of citizenship, age, health, capabilities, loyalties and the like,[25] they must also have the support of a minimum number of citizens in their province.[26] They must demonstrate this support by producing copies of their supporters' fingerprints and identity cards. Without them, candidates are ineligible to contest the election.

4.2.1 DPD Domicile Case (2008)

Applicants have raised other DPD-related issues in Constitutional Court challenges. The *DPD Domicile case* (2008) was particularly significant. It was bought by several applicants, including the DPD itself, along with around one-quarter of DPD members and senior representatives from various NGOs working on regional affairs and elections,[27] and 13 citizens. They challenged the constitutionality of Articles 12 and 67 of the 2008 General

25 Article 60 of the 2003 General Election Law; Article 11(2) of the 2008 General Election Law; Article 12 of the 2012 General Election Law.

26 Candidates require 1,000 citizens to support them in provinces with populations of less than one million; 2000 supporters in provinces with between one and five million; 3000 for provinces between 5 and 10 million; 4000 for provinces between 10 and 15 million; and 5000 supporters for provinces with more than 15 million citizens (Article 11(1) of the 2003 General Election Law; Article 13 of the 2008 and 2012 General Election Laws.

27 Namely, Hadar Navis Gumay (Executive Director of Cetro), Saafroedin Bahar (Chairperson of the Council of Experts of the National Secretariat for the Protection of the Constitutional Rights of Traditional Communities), Sulastio (Head of the Indonesian Parliamentary Centre) and Sebastianus KM Salam (FORMAPPI Coordinator).

Election Law.[28] Article 12 sets out the candidacy requirements for DPD members and Article 67 outlines the administrative requirements for nominating oneself. Neither Article 12 nor Article 67 specified that candidates must be domiciled in the province in which they stood for election to the DPD. This, the applicants argued, breached Article 22C(1) of the Constitution, which states: 'Members of the DPD are to be elected from each province by general election'. Articles 12 and 67 also did not specify that DPD candidates must be individuals, rather than 'from' political parties. For the applicants, this breached Article 22E(4) of the Constitution ('Contestants in general elections to choose DPD members are to be individuals') (*DPD Domicile case*, 2008, p. 184).

The Court agreed with the domicile argument. Given that the DPD's primary purpose was to represent regional interests at the national level, the domicile requirement was implicit and supported by the text of both Articles 22C(1) and (2), which referred to DPD members being 'from' and 'elected from' provinces. These constitutional norms needed to be reflected in the requirements for DPD candidacy in Articles 12 and 67 of the 2008 General Election Law. The Constitutional Court therefore held that Articles 12 and 67 were conditionally constitutional provided that they were 'given the meaning to contain' the requirement that candidates be domiciled in the province they sought to represent (*DPD Domicile case*, 2008, p. 215).

The Court took the opposite view about whether Article 22E(4) of the Constitution required DPD candidates to be independent of a political party. The Court decided that the non-party requirement was not implicit in Article 22E(4), which merely specified that DPD candidates be individuals. For the Court, this prevented a party nominating them, but did not prevent candidates being a political party member. It was, therefore, unnecessary for Articles 12 and 67 to include the 'non-party' requirement.

5 Presidential Elections

Since 2004, Indonesian presidents and vice-presidents have been directly elected as a pair (Article 6A(1) of the Constitution). Each pair must be proposed prior to the general election by a political party or a coalition of political parties (Article 6A(2)). However, not all political parties can nominate a pair.

28 Different applicants put forward different arguments, and, for ease of reference, I do not specify here which applicants put forward which arguments. This case is also discussed in Chapter 3 in the context of standing requirements.

Only those obtaining at least 25% of the national vote in legislative elections or holding 20% or more of seats in the DPR can nominate. Parties not meeting this threshold must form a coalition with other parties so that they collectively meet it if they wish to nominate a pair (Article 9 of the 2008 Presidential Election Law). This '25/20% threshold' represents a significant increase to the 15/20% threshold adopted in Article 5(4) of the 2003 Presidential Election Law.

A presidential/vice-presidential pair will be elected if it obtains at least 50% of votes, including at least 20% of votes in more than half of Indonesia's provinces (Article 6A(3)). If no pair meets this threshold, then the two pairs obtaining the largest number of votes contest a second-round election, with the pair obtaining the most votes being declared the winner (Article 6A(4)). If only two pairs contest a presidential election, then the pair obtaining the most votes wins, even if it does not also receive at least 20% of votes across more than half of Indonesia's provinces. The Constitution establishes various prerequisites for candidates and restricts presidents and vice-presidents to a maximum of two five-year terms (Article 7).

In 2004, 2009 and 2014, presidential elections were held three months after the general legislative elections. However, for reasons discussed in Chapter 9, the Constitutional Court has ruled that, from 2019, general elections and presidential elections must be held together.

6 Pemilukada

As mentioned earlier in this Chapter, each Indonesian province, county and city has an executive government. These administrations are led by regional heads (*kepala daerah*): governors (*gubernur*) in provinces, regents (*bupati*) in counties, and mayors (*walikota*) in cities. Since 2005, these officials have been directly elected in so-called Pemilukada (*Pemilu Kepala Daerah*, literally Regional Head Elections).[29] Previously, under the 1999 Regional Government Law, regional heads were appointed and dismissed by their corresponding local parliament (DPRD).[30] However, in some parts of Indonesia this process had degenerated into a bidding war, with some DPRDs appointing the pairs offering their members the most money (Erb and Sulistiyanto, 2009, p. 18).

The shift towards direct Pemilukada appears to have been precipitated, at least in part, by the Constitutional Court's decision in the *Direct Pemilukada Elections case* (2004). The applicants had argued that Article 18(4) of the

29 Article 56 of the 2008 Amendment to the 2004 Regional Government Law.

30 Article 34 of the 1999 Regional Government Law.

Constitution, which stipulates that regional heads be democratically elected, required that they be directly elected. A majority of the Court disagreed, holding that the legislature could choose how regional heads were elected, because Article 18(4) did not specify a mechanism. For the Court, both direct election by citizens and election by a majority of the relevant subnational legislature were sufficiently democratic to fall within Article 18(4).

Like the president and vice-president, regional heads and their deputies run for election in pairs and serve five-year terms.[31] To be elected, they must obtain more votes than any other pair and at least 30% of the vote. If no pair meets this threshold, then the two pairs with the most votes enter a second-round run-off election. The pair winning this second round is elected.[32]

Prior to 2007, to stand for election, regional head candidates needed nomination from political parties or coalitions that obtained 15% of votes or 15% of the seats in the corresponding DPRD.[33] However, this changed when the Constitutional Court decided the *Independent Pemilukada Candidates case* (2007). The applicant, Lalu Ranggalawe, was a local parliamentarian in Lombok who wanted to stand in regional head elections but suspected that the party with which he was associated wanted to support another candidate. He challenged various provisions of the 2004 Regional Government Law that prevented independent candidates standing for election as regional heads.

Ranggalawe pointed to the 2006 Aceh Government Law, which permitted independent candidates and argued that the 2004 Regional Government Law's prohibition was discriminatory and hence unconstitutional.[34] The Court agreed, observing that Article 18(4) of the Constitution, which required that regional heads be democratically elected, was the constitutional basis for contrary statutory provisions: Articles 56 and 59 of the 2004 Regional Government Law, which required political party nomination, and Article 67(1)(d) of the 2006 Aceh Government Law, which permitted independent candidates. For the Court, the result was 'dualism': candidates could nominate themselves in Aceh, but could not in other parts of Indonesia. This breached Article 28D(1) of the Constitution. The Court decided that, to resolve this inequality, independent candidates should be permitted to nominate themselves to stand as governors, mayors or regents across Indonesia. The Court made adjustments to the 2004 Regional Government Law to permit this.

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31 Article 59(1) of the 2008 Amendment to the 2004 Regional Government Law.

32 See Article 107 of the Second 2008 Amendment to the 2004 Regional Government Law.

33 Article 59(2) of the 2008 Amendment to the 2004 Regional Government Law; Article 36(2) of Government Regulation 6 of 2005 on the Election and Appointment of Regional Heads.

34 Under Articles 27(1) and 28D(3) of the Constitution.

The Court's decision was legally unconvincing. For example, the Court did not explain why it permitted independent candidates to extinguish this inequality by self-nomination, instead of invalidating Article 67(1)(d) of the 2006 Aceh Government Law. After all, Article 67(1)(d) was only ever intended as a temporary measure. Article 256 of the Aceh Government Law provided that Article 67(1)(d) would be 'valid and implemented only for the first elections held after this statute is enacted', on 1 August 2006. In subsequent elections, independent candidates would no longer be permitted. It is, therefore, strange that the Court intervened at all, given that by the time the Court decided the case, almost one year later on 23 July 2007, many of these 'first' regional head elections had already taken place.[35] In other words, by operation of Article 256, Article 67(1)(d) was probably no longer valid when the Court reviewed it.

Nevertheless, in one of the few direct legislative responses to a Constitutional Court decision, the DPR amended the 2004 Regional Government Law in 2008, largely to give effect to the Constitutional Court's decision in the *Independent Pemilukada Candidates case* (2007). The amendments provided a statutory basis for independent candidates to stand for regional head elections across Indonesia. Pairs of independent candidates can now nominate themselves, provided that they can demonstrate specified levels of support in the city or county in which they seek election.[36]

However, the national parliament did not also revoke Article 256 of the 2006 Aceh Government Law. In the *Independent Pemilukada Candidates case* (2010), four applicants who wanted to stand as independent candidates in Aceh sought its invalidation. They feared that, despite the 2008 amendments to the 2004 Regional Government Law, the local electoral commission would bar them from standing as independent candidates under Article 256.

The Court invalidated Article 256, explaining that the provision had 'lost its relevance' because the 2008 Amendments to the 2004 Regional Government Law overrode it and permitted independent candidates. The Court also observed that having independent candidates, as originally permitted under

35 Elections for Aceh governor, for four city mayors and for 15 county regents took place on 11 December 2006, with some requiring run-off elections in mid-March 2007 (Riiber, 2007).

36 See Article 2b of the 2008 Amendment to the 2004 Regional Government Law. The requisite support is between 3–6.5% of voters in the region in which they seek to stand and depends on the population of that region. This support is demonstrated by producing photocopies of the identity cards of citizens who live in that city or county: Article 2e of the 2008 Amendment to the 2004 Regional Government Law.

Article 67(1)(d), made regional head elections more democratic in any event.[37] For the Court, having independent candidates also provided legal recognition, guarantees, protections and certainty, and equal opportunity, as guaranteed by Articles 28D(1) and (4) of the Constitution (*Independent Pemilukada Candidates case*, 2010, para [3.13.4]).

7 Customary Voting Procedures

Customary voting systems, commonly referred to as *Noken* and primarily practised in parts of Papua, deserve brief mention.[38] Some of these practices are said to have been employed since the 1971 General Elections in all types of elections across many, but not all, electoral districts in Papua (Hukumonline, 2014a).

Noken literally means a traditional bag made from bark (Nolan, 2012). However, the term also describes various voting practices. Panggabean (2014) discusses two of them. The first is called '*noken gantung*' or 'hanging bag'. This involves the customary chief, usually the village head, instructing constituents to vote for a particular candidate by putting their votes in a bag, rather than by secret ballot. The main objective is for votes to be distributed to a single candidate, amongst candidates in a proportion determined by the chief, or as 'agreed' by the community (Hukumonline, 2014a).

The second type of *Noken* is the so-called 'Bigman' process, under which citizens in a particular area allow their customary chief to vote on their behalf. Under some variations of this process, voters need not even attend polling stations, with community leaders deciding how many votes each candidate should obtain, either marking ballot papers themselves or noting the final result on tally forms (Nolan, 2014).

Applicants claiming to have lost seats in elections employing these practices have challenged the results in the Constitutional Court.[39] For example, in the *Papua Gubernatorial Election case* (2013, para 3.24.4.4]), the applicant

37 Though in challenges to the prohibition on independent candidates standing for presidential election, discussed in Chapter 9, the Court has held that requiring party nomination is neither contrary to 'democracy' nor does it impede citizens' rights to participate in government – they must simply participate via a political party.

38 Similar practices – called 'represented voting' (*pemilihan diwakilkan*) – are also used in parts of Bali (Ihsanuddin, 2013).

39 *Papua DPD election* (2009); *Yahumiko* (2011); *Papua Gubernatorial Election* (2013); and *Bali Gubernatorial Election* (2013) cases.

described the *Noken* process as a 'conspiracy' to ensure his defeat between the regional electoral commission and his electoral competitors. Even the unsuccessful Prabowo-Hatta presidential candidate pair complained about *Noken* when challenging the 2014 results.

However, the Court has consistently held that traditional voting practices are legitimate expressions of local custom, protected under Article 18B(2) of the Constitution, which states:

> The State recognises and respects *adat* [customary] law communities and their traditional rights, provided that they remain in existence and accord with community developments and the principle of the Unitary State of the Republic of Indonesia, as regulated by statute.

In the *Papua DPD Election case* (2009, para [3.24]), for example, the Court said:

> The Court can understand and value the cultural values alive in the unique Papua community in running the election by 'community agreement' or 'acclamation'. The Court accepts the method of collective voting…which has been accepted in Yahukimo [county], because if forced to have an election that accords with the applicable law, there are concerns that conflict will emerge in the local community. The Court believes that it is best that [these local communities] are not involved/carried to a system of competition/division within and between groups that could disturb the harmony with which they have been instilled.

Though these decisions have drawn praise for recognising customary law and practices within the Indonesian legal system, the voting processes the Court endorsed are hardly democratic. In these decisions the Court has disregarded Article 22E(1) of the Constitution, which requires that general elections be 'direct, public, free, secret, honest and just'. Of course, when citizens' voting preferences are determined by another, or when citizens cast their votes by placing them, in full public view, into a bag representing a candidate or political party, elections are neither 'free' nor 'secret'. In short, the Court has not transparently reconciled the requirements of Article 22E(1) with recognising these customs under Article 18B(2).

Worse, when 'accepting' these practices, the Court has not openly considered their susceptibility to fix outcomes through fraud and conspiracy, particularly between candidates and customary chiefs. And, even if fraud is not present and customary law chiefs genuinely prefer one candidate for policy reasons, *Noken* voting can lead to skewed results. In particular, some *Noken*

processes result in 100% participation rates, with 100% of votes cast for a particular candidate (Hukumonline, 2014a; Nolan, 2014). One would not expect such results in a free and fair electoral system in which voting is not mandatory; indeed, Indonesia's participation rate for the 2014 legislative and presidential elections was closer to 70%.[40]

8 Electoral Institutions and Administration

As mentioned, Article 22E(5) of the Constitution states that 'general elections are to be organised by a general electoral commission that is national, permanent and independent'. Article 22E(6) simply notes that 'further provisions regarding general elections are to be regulated by statute'. At time of writing, the 2011 Electoral Administration Law was the primary statute governing the various committees and commissions involved in handling elections, including supervisory bodies and officials such as polling officers.

Most important amongst these commissions is the KPU – the General Election Commission – which has permanent offices in the national capital, provinces, counties and cities (Article 4). The Commission prepares elections, including: verifying candidates and parties; encouraging citizens to register and vote; managing and training officials who perform election-related functions such as polling officials; running elections, including managing logistics; and post-election tasks, such as following up on reports of impropriety made by supervisory agencies, counting votes, and formally announcing the winners (see Article 8). The national KPU has seven members, while regional commissions have five. The KPU has almost 14,000 staff in over 500 offices throughout Indonesia.[41]

The KPU has been strongly criticised for consistently failing to properly administer the post-Soeharto elections for which it has been responsible. Allegations have ranged from failure to meet its own deadlines and being generally incompetent, to bias, corruption and an unwillingness to pursue credible claims of electoral impropriety by political parties (Sukma, 2009; Nasution, 2011). While some allegations of KPU corruption have been proven, with former members being tried and convicted (Butt, 2009c), others have

40 For voter turnout data for Indonesia, see http://www.idea.int/vt/countryview.cfm?CountryCode=ID.

41 See Rumahpemilu.org (2014) 'Brief Overview of the 2014 Elections in Indonesia', available at: www.rumahpemilu.com.

been made in electoral disputes before the Constitutional Court. These disputes are discussed in Chapter 10.

The Constitutional Court has established that the reference to 'independent electoral commission' in Article 22E(5) of the Constitution does not refer to a specific institution and that, therefore, it applies to the General Electoral Commission (the KPU) and other institutions involved in electoral administration.[42] These include the *Bawaslu* (Election Supervisory Board or *Badan Pengawas Pemilihan Umum*) and the Electoral Administration Honour Council (DKPP, or *Dewan Kehormatan Penyelenggara Pemilu*). The main functions of both bodies are outlined in the 2011 Electoral Administration Law. The *Bawaslu* supervises the Electoral Commission's work at all stages of the election, including planning, logistics, administering the electoral roll and applying candidacy rules. It also hears complaints about violations of electoral rules and even resolves some types of electoral disputes (Article 73). Like the KPU, it has national, provincial, county and city offices (Article 69), but also sub-district and even overseas presence. *Bawaslu*'s national and provincial offices are permanent, but its lower-level offices are temporary, established two months before elections and disbanded two months after (Article 70).

The Electoral Administration Honour Council hears allegations that the KPU and *Bawaslu* themselves have violated electoral laws and codes of conduct that apply to them. The Council can impose sanctions, including dismissing members, for violations.[43]

8.1 *Constitutional Court Cases*

The Constitutional Court has heard several cases about the KPU and *Bawaslu*, two of which I briefly cover here: the *KPU/Bawaslu Appointments case* (2010) and the *KPU* case (2011). In these cases, the Court emphasised the importance of ensuring that members of these electoral institutions are independent, from both politicians and each other.

8.1.1 KPU/Bawaslu Appointments Case (2010)

The KPU/Bawaslu Appointments case (2010) was a challenge to provisions of the 2007 Electoral Administration Law that regulated how *Bawaslu* members were appointed. Under that Law, the KPU proposed members and then the

42 *KPU/Bawaslu appointments case* (2010, para [3.18]), affirmed in the *KPU Commissioners case* (2011, p. 55).

43 In April 2014, the Council was chaired by former Constitutional Court Chief Justice, Jimly Asshiddiqie, who reported that the Council had removed 129 officials from the KPU and Bawaslu for various breaches (Hukumonline, 2014i).

Bawaslu installed them (Articles 93, 94(1)–(2) and 95). For the Court, these provisions breached various constitutional provisions, including Article 21E(5), which required that electoral institutions be independent. The appointment provisions exposed *Bawaslu* to the KPU's will, which in turn could undermine *Bawaslu*'s independence. If under investigation by *Bawaslu*, for example, the KPU could starve *Bawaslu* of candidates, thereby hobbling it. This might cause legal uncertainty or impede the conduct and legitimacy of elections. The Court gave *Bawaslu* exclusive power to choose and then appoint its own members.

When the 2007 Electoral Administration Law was replaced in 2011, the DPR reconfigured the appointment process, excluding the *Bawaslu* and KPU altogether. A 'selection team', comprising up to 11 people of high repute and integrity, drawn from government and the general public and 'taking account of female representation', is now involved in the process. It receives and assesses applications from people who wish to serve on the KPU and *Bawaslu* and submits its preferred candidates to the President. The President then passes their names to the DPR, which performs a fit and proper test and makes the final selections (Articles 12–15 and 87–91 of the 2011 Electoral Administration Law).

8.1.2 KPU Case (2011)

The 2007 Electoral Administration Law had prohibited people serving as members of the KPU within five years of being a member of a political party. However, in 2011, when the 2007 Law was replaced, the DPR removed this five-year time limit. Article 11(i) of the 2011 Electoral Administration Law allowed former political party members to join the KPU immediately after relinquishing membership of that political party. These changes were widely seen as attempts by parties to 'expand their influence within the KPU so that decisions on the conduct of the 2014 election could be manipulated to favour their interests' (Fealy, 2011, pp. 338–39).

The constitutionality of Article 11(i) was challenged in the *KPU case* (2011). The Court observed that if elections were run by administrators biased in favour of particular candidates, elections would be perceived as unfair, thereby threatening democracy itself (*KPU case*, 2011, p. 56). For the Court, then, the KPU recruitment process must minimise the potential for appointing biased members. In the words of the Court:

> Because general elections are contested by party politicians, statutes must limit or prohibit party politicians contesting the election from acting as an administrator at the election. This includes not only active party politicians, but also former party politicians who still have partiality

> towards the party from which they came, and still influence the determination of the policy of that political party.
>
> *KPU case,* 2011, p. 57

In this context, if political party members could resign and immediately join the KPU, political parties could simply 'insert their political cadres into the General Electoral Commission' (*KPU case,* 2011, para [3.14]). This would undermine the independence of the KPU, thereby breaching Article 22E(5) of the Constitution (*KPU case,* 2011, p. 57). Further, if political parties were represented in the KPU, conflict between KPU members would be likely, threatening the KPU's ability to perform its essential functions (*KPU case,* 2011, p. 58).

To avoid this, the Court decided to prohibit party members from joining the KPU for at least five years after ceasing to be a member of that political party. This would 'sever the connection between the members and the political party…' (*KPU case,* 2011, p. 58). The court chose five years because this was a full electoral term and the period imposed in the 2007 Electoral Administration Law.

Incidentally, the Court also found constitutional fault with Article 109(4) of the 2011 Electoral Administration Law, which concerns the DKPP's composition. These provisions had allowed political parties to sit on the Council. For the Court, this threatened the independence of electoral administration, because those being monitored (that is, political parties contesting the elections) were themselves involved in the monitoring. The Court also declared that the government should not be represented on the Council, given that the executive in Indonesia's political system 'was inseparable from…political parties' (*KPU case,* 2011, p. 59). (Presumably this statement refers to presidential and vice-presidential candidates needing to be nominated by political parties in order to stand for election.) The Court decided that Article 109(4) was unconstitutional unless interpreted to specify that the Council comprises 'one member each from the KPU and *Bawaslu* and five community figures'.

CHAPTER 8

Legislative Elections

The mechanics of general electoral systems have been a 'fertile area of judicial engagement' in constitutional courts around the world (Issacharaoff, 2011, p. 972). The Indonesian Constitutional Court is no exception. In this Chapter, I discuss how the Court has reviewed the constitutional validity of aspects of Indonesia's statutes regulating legislative elections and made important changes to them.

First, the Court has reviewed various candidacy requirements to stand for election in Indonesia's national and subnational representative bodies. For example, the Court has decided whether former members of Indonesia's Communist Party, convicted criminals, and even members of the armed forces, can be prohibited from standing for election.

Second, the Court has assessed the constitutionality of statutes specifying that parties must meet various 'verification' requirements to contest elections. In these cases, applicants, and some dissenting judges, have argued that the requirements make establishing a party so difficult that they impede the constitutional right to associate. Smaller parties have also asked the Court to invalidate the so-called 'parliamentary threshold' – that is, the minimum percentage of votes parties must obtain to be allocated any seats.

Third, the Court has determined the extent to which political parties can control their members after being elected to parliament. For instance, if a representative leaves their political party after being elected, can that party remove the representative from parliament, or should the representative be able to remain in parliament purely because the people elected him or her?

Finally, the Court has decided how votes are 'converted' into parliamentary seats and whether parties can choose which of its candidates receive seats.

1 Judicial Review of Candidacy Rules

The Constitution does not impose prerequisites for prospective legislative candidates. The legislature has established them by statute. Article 60 of the 2003 General Elections Law required DPR, DPD and DPRD candidates to:

a. be an Indonesian citizen over 21 years old;
b. believe in God;

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c. live in Indonesia;
d. be able to speak, read and write in Indonesian;
e. have senior high school education or equivalent;
f. be loyal to *Pancasila*, the Constitution and the ideals of the Proclamation of 17 August 1945;
g. not be a former member of the prohibited Indonesian Communist Party (*Partai Komunis Indonesia*, PKI) including its mass organisation, not have been directly or indirectly involved in the 1965 Coup, and not have been a member of another prohibited organisation;
h. not have had their right to vote revoked by a binding court decision;
i. not be currently serving a prison sentence for a crime for which the maximum sentence is five years or more;
j. be physically and mentally healthy, based on the examination of a competent doctor; and
k. be registered to vote.

Article 50 of the 2008 General Election Law and Article 51 of the 2012 General Election Law carried over many of these prerequisites, with the following exceptions. First, 'not currently serving a prison sentence…' was changed to 'not having served a prison sentence…' (Article 50(g); Article 51(g)). Second, neither the 2008 nor the 2012 General Elections Law excluded former members of prohibited organisations from standing. Third, Article 50 of the 2008 General Election Law added the following requirements (retained in the 2012 Law):

- be prepared to work full time;
- resign from one's position as a public servant, member of the armed forces or police, manager of a state-owned enterprise or a regional state-owned enterprise, or any other body funded by the state;
- be prepared to stop working as an accountant, lawyer, notary, or land registration official; not provide goods or services connected state finances; and stop performing other work that could give rise to a conflict of interest with DPR or DPRD membership responsibilities;
- be a member of a political party; and
- nominate for only one representative institution and in only one electoral district.

1.1 PKI Case (*2003*)

The prohibition against candidates being former members of the Indonesian Communist Party, contained in Article 60(g) of the 2003 General Election Law, was challenged in the Court's first candidacy case: the *PKI case* (2003). The

application was brought by about 30 people, some of whom had been imprisoned for direct or indirect involvement in the Coup of 31 September 1965.[1]

For a majority of the Court, Article 60(g) prohibited Indonesian citizens from election based on 'a political view that they had once held'. Yet, they pointed out, the Constitution, and Indonesia's 1999 Human Rights Law, prohibited discrimination, including on the basis of political persuasion. Article 27(1) of the Constitution states that all citizens are equal before the law and in government without exception; Article 28D(1) gives each person the right to legal recognition, guarantees, protection and certainty which is just, and to equal treatment before the law; and Article 28I(2) grants freedom from discrimination on any basis and the right to protection against that discrimination (*PKI case*, 2003, p. 34). The majority also emphasised that the rights to vote and stand for election were guaranteed by the Constitution, national legislation, the Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights.[2]

Limiting or eradicating the rights to vote and stand was, therefore, 'a violation of the human rights of citizens' (*PKI case*, 2003, p. 35).

The Court accepted that Article 28J(2) of the Constitution permits lawmakers to enact legislation limiting people's rights and freedoms. However, the Court emphasised that Article 28J(2) could be applied only for reasons that 'make sense, …are proportional and not excessive', and 'guarantee recognition and respect for rights and freedoms of others and… just demands in accordance with moral considerations, religious values, security and public order in

1 As mentioned in Chapter 3, even though the Court granted standing to many of these applicants, it rejected others who could not prove their membership of a prohibited association or involvement in the coup and, therefore, could not demonstrate that Article 60(g) caused them 'constitutional damage' (*PKI case*, 2003, p. 33).

2 As the Court pointed out, Article 21 of the Universal Declaration of Human Rights states:

> (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives; (2) Everyone has the right to equal access to public service in his country; (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures. Article 25 of the ICCPR states: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country.

a democratic community' (*PKI case*, 2003, p. 35). Article 28J(2) could not be applied to excuse Article 60(g) because it 'employed only political considerations' (*PKI case*, 2003, p. 35). In this context, the Court observed that voting right restrictions could generally be imposed legitimately only for reasons of incapacity, such as age or illness (*PKI case*, 2003, p. 35).

Ultimately, the majority invalidated Article 60(g), concluding by observing that the prohibition it contained was:

> no longer relevant in light of the efforts at national reconciliation desired by the Indonesian nation in the move towards a more democratic and just future. Even though the PKI's involvement in the coup in 1965 is not doubted by a large proportion of Indonesians, and despite the continuing validity of MPRS Decrees XXV/MPRS/1996…and I/MPRS/2003…, former members of the PKI and its mass organisations…must be treated the same as other citizens, without discrimination.
>
> *PKI case*, 2003, p. 38

Justice Roestandi, a retired three-star general, issued the sole dissenting judgment, declaring that he would not have invalidated Article 60(g). He argued that Article 22E(6) of the Constitution, which states that 'Further provisions on elections will be regulated by legislation', authorised lawmakers to make more detailed rules about elections (*PKI case*, 2003, p. 39). Such rules could limit or restrict candidacy, including on the grounds in Article 60(g) (*PKI case*, 2003, p. 40). According to Roestandi, Article 28J(2) could be applied to justify Article 60(g) impeding the democratic rights of aspiring legislative candidates, because it was directed towards ensuring 'security and public order' (*PKI case*, 2003, p. 40). For him, the government could determine what constituted a matter of 'security and public order' and the Court lacked constitutional power to override that determination (*PKI case*, 2003, p. 43). Roestandi's opinion is legally defensible. However, it was widely presumed to reflect the military's historical disdain for the PKI. Even Roestandi's assistant disagreed with his decision, explaining his objection in an article in *Kompas* newspaper (Harun, 2004).

1.2 *Former Convicts*

The Constitutional Court has also heard several challenges to provisions in general election laws that prohibit candidates standing for election or occupying a particular office if convicted of a crime attracting a prison sentence of five years or more. The Court has progressively watered down this prohibition by creating a list of exceptions.

Although most of these cases have been brought by legislative candidates, the first significant case concerning this prohibition, the *Muhlis Matu* case (2007), was brought by a candidate wishing to contest regional head elections. The Court subsequently carried over its reasoning into its legislative candidacy cases.

1.2.1 *Muhlis Matu Case* (2007)

The applicant in the *Muhlis Matu case* (2007) was a member of the South Sulawesi parliament who wanted to run for deputy mayor in Takalar, South Sulawesi. Article 58(f) of the 2004 Regional Government Law prohibited candidacy for those convicted of a crime for which the maximum penalty was five years or more. The applicant had been convicted of attempted murder – a crime which fell within that category.[3]

The Article 58(f) prohibition is common to many Indonesian statutes which establish the prerequisites for holding public office. Other offices subject to the same or a similar restriction include the presidency, vice-presidency, the judiciary, the legislature, and senior positions in important state institutions such as the electoral and judicial commissions (*Muhlis Matu case*, 2007, p. 120). The applicant also challenged the equivalent to Article 58(f) in those statutes.[4] He argued that this standard prohibition was unconstitutional and therefore invalid.

Although the applicant put forward several grounds, his primary contention was that the prohibition was discriminatory, thereby breaching Articles 27(1) (equality before the law), 28(1) (freedom form discrimination) and 28D(1) (legal equality, amongst other rights). A majority of the Court dismissed this argument. Trustworthiness and moral integrity were required in high public offices such as these. The DPR and the president, as lawmakers, therefore could impose prerequisites to ensure that candidates possessed these qualities (*Muhlis Matu case*, 2007, p. 124). In any event, these provisions were not discriminatory because they applied to all citizens who wanted to put themselves forward as candidates. And, even if they were discriminatory, they did not discriminate on grounds prohibited under the 1999 Indonesian Human Rights

3 Article 338 of the Criminal Code provides a maximum of 15 years' imprisonment for murder. Article 53 provides that the maximum penalty for a crime is to be reduced by one third if the defendant had the intent to commit the crime but was, for any of several reasons, prevented from carrying it out.

4 Namely, Article 6(t) of the 2003 Presidential Election Law; Article 16(1)(d) of the 2003 Constitutional Court Law; Article 7(2)(d) of the 1985 Supreme Court Law; and Article 13(g) of the 2006 National Audit Agency Law.

Law or the International Covenant on Civil and Political Rights: religion, race, ethnicity, language, gender, political conviction, or social status. For the majority, provided that prerequisites were 'objective' and 'genuinely required' for a particular government position or activity, they did not violate the constitutional guarantees of equality and freedom from discrimination. To the contrary, such prerequisites were justifiable by reference to Article 28J(2) of the Constitution.

Matu had also pointed to Article 28D(3) (the right to equality in government), which, he argued, entitled every person – even convicted criminals – to stand for election as a regional head. Using the same reasoning as they had used to dismiss the discrimination arguments, the majority held that limiting opportunities to hold government positions was not automatically unconstitutional if objective and necessary for those positions, particularly if they required public trust and moral credibility (*Muhlis Matu case*, 2007, p. 129).

After rejecting these arguments, the majority could have concluded that the prohibition was constitutional and dismissed the case. Instead, they made additional observations about the prohibition. Matu had argued that even though the act for which he was convicted was illegal under national law, it was acceptable under his traditional culture and therefore was not reprehensible. His crime was an attempted honour killing, which he claimed he had performed to maintain his honour and dignity and that of his wider family. As Matu's lawyer explained to the Indonesian media (Hukumonline, 2007), Matu's wife's older brother in law had allegedly raped his sister's sibling and had even tried to rape Matu's wife. His family had chosen Matu to maintain its honour and dignity by killing the perpetrator. Matu's lawyer emphasised that honour was central to the applicant's Bugis-Toraja customs, which endorsed killing the person who caused dishonour as a form of 'self-defence'. Indeed, he argued that if Matu had not attempted to murder the perpetrator, then Matu himself would have been punished. The majority gave short shrift to this argument, pointing out that customary law did not justify or excuse an act made criminal under national law. At best, judges could consider customary law issues or obligations during sentencing (*Muhlis Matu case*, 2007, p. 126).

Nevertheless, the majority observed that, while the impugned provisions were directed towards ensuring that candidates possessed high standards of integrity, conviction for a crime was only one indicator of integrity. There were at least two circumstances where a conviction – even for a serious crime – did not affect integrity or trustworthiness.

First, a person might be convicted of a crime where they did not deliberately intend to commit it or were merely negligent. In such circumstances, no 'intent' exists and the perpetrator is not 'bad'. Second, a person might be convicted for

expressing a view or political attitude. In the majority's view, citizens are permitted to freely express their views in democratic law-based states, and most citizens imprisoned for doing this have merely expressed political views different to those in power (*Muhlis Matu case*, 2007, p. 132). For example, the majority explained, Indonesia's first President, Soekarno, was imprisoned by the Dutch for political crimes, but these could hardly now be considered reprehensible (*Muhlis Matu case*, 2007, p. 125). If the impugned provisions captured those convicted of political crimes, then they would discriminate based on political persuasion. This, the majority declared, was prohibited by the Constitution, national law and international conventions, citing its decision in the *PKI case* (2003).

In the event, the majority held that the prohibition was constitutional on the condition that these two circumstances were excluded from its ambit. That is, citizens can be prohibited from holding public office if convicted of a crime attracting a sentence of five years or more, unless that crime was not intended, involved only minor negligence or fault, or was political (*Muhlis Matu case*, 2007, pp. 132–133).

The majority concluded by urging the legislature to consider whether this standard prohibition should apply to candidates seeking such different offices. It suggested that distinctions be drawn between elected and appointed officials; between the executive and the legislature; and between public office requiring significant trust (such as the judiciary, law enforcement and state financial controllers) and more administrative positions (*Muhlis Matu case*, 2007, p. 134). However, the majority explained neither why these offices or positions should be distinguished, nor upon what basis. This the majority left for subsequent cases, to which I now turn.[5]

1.2.2 *Kaat Case* (2008)

The Court affirmed *Muhlis Matu* (2007) and applied it to DPR candidates in the *Kaat case* (2008) – a challenge brought by Julius Daniel Elias Kaat, a village head in East Nusa Tenggara. He had been nominated by the National Awakening Party (PKB) to stand for the national parliament. However, he had served a

5 Fadar, in his sole dissent, held that the impugned provision contradicted prohibitions relating to other political positions. While citizens were prohibited from becoming candidates to contest presidential or regional head elections, they could stand as members of the DPRD, provided that they were not 'currently serving' a sentence for committing a crime carrying a sentence of five years or more. For Fadjar this represented double standards because the applicant could serve on the Takalar DPRD, but could not become regional head. This caused legal uncertainty and injustice thereby breaching Article 28D(1) of the Constitution.

28-month prison sentence for aggravated assault, the maximum penalty for which is five years' imprisonment under Article 351(2) of the Criminal Code. He challenged the constitutionality of Article 50(1)(g) of the 2008 General Election Law, which prohibited him from standing.

The Court applied *Muhlis Matu* (2007), reiterating that the prohibition was not discriminatory because it applied to all aspiring candidates, but that even if it was, it did not discriminate on a prohibited basis (*Kaat case*, 2008, p. 15). The Court, therefore, declared Article 50(1)(g) of the 2008 General Election Law conditionally constitutional, just as it had Article 58(g) of the 2004 Regional Government Law in *Muhlis Matu*. In other words, Article 50(1)(g) was constitutional provided that it did not capture offences involving minor negligence or fault, or political crimes. The Court observed that Kaat's crime did not fall within these exceptions.

1.2.3 *Robertus Case* (2009)

The *Robertus case* (2009) was a challenge to Articles 12(g) and 50(1) of the 2008 Election Law and Article 58(f) of the 2004 Regional Government Law. These provisions prevented the applicant, a citizen named Robertus, from standing for election to the DPD, DPR and any provincial or city/county DPRD. He had served almost ten years in prison for violent robbery causing death.[6] In its decision, the Court expanded the exceptions it established in *Muhlis Matu* (2007) and applied in *Kaat* (2008).

Like the applicants in *Muhlis Matu* and *Kaat*, Robertus argued that these provisions were discriminatory and breached Articles 27D(1), 28C(2) and 28D(1) of the Constitution. The Court dismissed these arguments, giving the same reasons. However, the applicant made further, perhaps stronger, arguments than had the applicants in *Muhlis Matu* and *Kaat*. Robertus claimed that the prohibition breached Article 1(2) of the Constitution, which states that sovereignty lies with the people, for two reasons. First, the prohibition impeded former convicts exercising, as citizens, their democratic rights to stand. Second, the prohibition prevented citizens from freely exercising their right to vote, because they were unable to vote for former convicts, even though those convicts might have excelled in representative office, despite their convictions. Robertus argued that Article 1(2) required that the people, not lawmakers, decide whether a former convict should be electable (*Robertus case*, 2009, p. 67). If a past conviction affected a former convict's capacity to 'serve the people', citizens could simply refuse to vote for them.

6 The applicant was convicted under Articles 365 and 351(3) of the Criminal Code and Article 1(1) of Emergency Law 12/Drt/1951.

The Court appeared to accept these arguments, appealing to concepts of justice and morality in the work of legal philosopher Lon Fuller. The Court referred to Fuller's contention that a rule must satisfy moral criteria in order to become 'law': 'unjust laws are not laws, though they fulfil the formal requirements'.[7] Following this, an unjust statutory precondition for holding office would not be binding. The Court then categorised the prohibition as 'insufficiently just from a moral/legal perspective', particularly compared with the prohibitions the Court had invalidated in the *PKI case* (2003). Yet the Court specified neither why prohibiting convicted criminals from standing was unjust or immoral, nor why vague concepts of justice and morality, rather than the Constitution, should be used as yardsticks in constitutional adjudication. For instance, it is unclear why the Court did not merely invoke the rights to vote and stand that it identified in *PKI* (2003).

Nevertheless, the Court then considered whether the prohibition should be imposed on people seeking *elected* office. The Court emphasised that a person's 'electability' should not be entirely left to voters 'on the basis that [the voters] will bear the consequences of their own choices'. Some safeguards were necessary to protect voters and to ensure that they were able genuinely to assess the candidates standing for election. To these ends, the Court added the following four exceptions to those it established in *Muhlis Matu*:

1. Candidates must honestly and openly disclose conviction for a crime punishable by five years' imprisonment or more, 'without concealing their background' (*Robertus case*, 2009, p. 79). Voters will then know whether they are voting for candidates who have committed serious offences.
2. Candidates must not be repeat offenders and must have adapted back into society. This exception would ensure public trust in officials holding public office.
3. At least five years must have passed since the sentence was completed. The Court reasoned that five years was the term of many public offices subject to the prohibition. (It is unclear, however, why the Court chose the term of office as the period after which an offender became eligible. Presumably this gave the prospective officeholder time to re-integrate. However, some offenders would need more time, and others less, to re-adapt.)
4. Candidates must not have had their right to vote or stand revoked by the court that convicted them.

7 Quoting from Zafer, MR (1994), *Jurisprudence, an outline*, pp. 44–45.

1.3 *Civil Servant Candidate Case* (2010)

The *Civil Servant Candidate* case (2010) was brought by Dr Muhammad Abduh Zen, a public servant from Palembang in Sumatra. He objected to Articles 12(k) and 67(2) of the 2008 General Election Law, which required public servants to resign before standing for the DPD. He wanted to contest the DPD election, but complained that, if he did so, he would lose the rights and entitlements he had accumulated as a civil servant, including to a salary, health insurance and pension.

Dr Zen argued that these provisions damaged several of his constitutional rights, including the right to equality before the law and in government (Article 27(1)), to legal recognition, guarantees, protection and certainty (Article 28D(1)), to obtain the same opportunities in government (28D(3)), and to protection from discrimination (Article 28I(2)).

The Court rejected these arguments, pointing to provisions of the 1999 Amendments to the 1974 Public Service Employment Law that required public servants to refrain from political activity. This would ensure their neutrality from political party influence and preserve 'cohesion', enabling them to focus their attention and energy on the tasks entrusted to them.[8] The Court emphasised that in previous cases – such as the *Purnomohadi case* (2009) – it had held that all constitutional rights could be limited. This included civil and political rights, amongst them the right to be elected to the DPD. Constitutional rights could also be limited by obligations that citizens entered into voluntarily (*Civil Servant Candidates case*, 2010, p. 55). For the Court, resigning as a public servant, and relinquishing the associated entitlements, was merely a legal consequence of the applicant's choice to move from government bureaucracy to political office – that is, to the DPD (*Civil Servant Candidates case*, 2010, p. 55).

1.4 *Political Rights of Police and Armed Forces*

Though police and army personnel voted in Indonesia's first post-independence elections in 1955, they have not since been permitted to exercise their voting rights. In return for foregoing their rights during the Soeharto period, 100 DPR seats were reserved for military personnel, allowing the military to play a 'dual function' (*dwifungsi*) in both defence and politics. By this time, the police had, for most intents and purposes, become a wing of the army, and the same prohibition applied to them.[9]

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8 See, in particular, Article 3 of the 1999 Amendments to the 1974 Public Service Employment Law, set out by the Court on p. 54 of its decision, and part 5 of the General Elucidation to the 1999 Amendments to the 1974 Public Service Employment Law.

9 In April 1999, under Habibie's presidency, the police were, by MPR Decrees, formally separated from the Armed Forces: MPR Decree VI of 2000 on the Separation of the Police and the

With the gradual withdrawal of the military from parliament in post-Soeharto Indonesia, some politicians and commentators have advocated restoring their voting rights. However, the prohibition remains, with many politicians continuing to support it despite Indonesia being the only country in the region to maintain it (McBeth, 2014).[10] Others have advocated maintaining the prohibition because many retired generals remain involved in politics. Soldiers might blindly vote for former military generals out of loyalty, or the army might split into factions supporting particular candidates. McBeth (2014) disagrees:

> [o]nce out of the chain of command, a general's power dissipates rapidly… In any event, Indonesia's one million or so soldiers and policemen won't make an iota of difference to the outcome of an election in a 180-million-strong electorate. In fact, voting collectively, they translate into just three seats in the 560-seat Parliament.

1.4.1 *Police Candidates Case* (2006)

The Constitutional Court has maintained the prohibition in the face of constitutional challenge. The issue was first raised in the *Police Candidates case* (2006). A retired police officer challenged statutes enacted in 2003 and 2004 that prohibited members of the armed forces and police from voting or standing for election, and even participating in election-related activities.[11] The applicant argued that precluding citizens from exercising these rights because of their employment background was discriminatory. However, the Court denied standing to bring the challenge because the applicant could not demonstrate that the prohibitions caused him constitutional damage. Because he was retired, the voting limitation no longer applied to him.

1.4.2 *Police and Army Voting Case* (2014)

The prohibition was maintained in the statutes governing the 2014 legislative and presidential elections. In May 2014, the Constitutional Court heard the *Police and Army Voting case* (2014) – a challenge to Article 260 of the 2008

Army; MPR Decree VII of 2000 on the Roles of the Police and the Army. Their separation was entrenched in 2000 in the third amendment to the Constitution (Article 30).

10 For his part, former President Susilo Bambang Yudhoyono issued inconsistent statements about this. On some occasions he declared that voting rights should be reinstated, but on others suggested that this should happen only once Indonesian democracy was 'more mature' and 'really consolidated' (Kumoro, 2012).

11 Specifically Article 145 of 2003 General Elections Law; Article 102 of the 2003 Law on Presidential Elections; Article 230 of the 2004 Regional Government Law; Article 28(2) of the 2002 Police Force Law; and Article 39(4) of the 2004 Armed Forces Law.

Presidential Election Law brought by well-known lawyers, including one from the Indonesian Institution for Constitutional Democracy. Article 260 required army and police personnel 'not to use their right to vote' in the 2009 presidential elections. Strictly speaking, this case concerned presidential election rules (the main focus of Chapter 9), but I discuss it here because a similar prohibition is contained in Article 326 of the 2012 General Election Law. (Presumably, the Court would have issued a similar decision had the case concerned the right of military personnel and police to vote in legislative elections.)

As in previous cases, the Court recognised that the rights to vote and stand were guaranteed by national statutes, international conventions and the Constitution.[12] Yet Article 260, along with other statutes, including the 2002 Police Force Law and the 2004 Armed Forces Law, restricted these rights for army and police officers.

The Court noted that these very restrictions had a long history.[13] It also cited its previous *Film Law case* (2007) decision, in which it had held that human rights could be limited by reference to Article 28J(2) of the Constitution. For the Court, the rights to vote and stand were 'restrictable', particularly for armed forces personnel and police because of their strategic importance (*Police and Army Voting case*, 2014, p. 27). The president's representative had emphasised that army and police neutrality was critical to their performing a 'stabilising function in security and defence of the nation' (*Police and Army Voting case*, 2014, para [3.18]). The representative also contended that the restriction helped minimise internal conflict within the army and police, which might otherwise be ignited if retired officers competed as candidates and serving officers could choose between them.

The Court accepted the president's view without apparent analysis or interrogation, let alone attempting to reconcile it with the Court's previous candidacy jurisprudence. In particular, the Court did not balance the right to vote – which, in the *PKI case* (2003), it had categorised as one of the most fundamental constitutional rights – against other rights or interests, as Article 28J(2) seems to require. Indeed, it did not explain, beyond vague references to stability and defence, how the public interest or order would be served by denying army and police officers the right to vote. Equally, the Court did not

12 The Court mentioned the following Constitutional provisions: Article 27(1) granted citizens the right to equality before the law and in government, Article 28D(1) to equality before the law, and Article 28I(2) freedom and protection from discriminatory treatment.

13 Citing MPR Decree VII/2000, which required that TNI members not exercise their right to vote, and that the police be neutral and not involved in politics.

explain how voting in an election might compromise the neutrality of the army or the police and what anticipated consequences that would have. The Court held that, to 'guard the existence of the armed forces and the police as apparatuses of defence and security…it is appropriate that the army and police are neutral in the 2014 presidential elections' (*Police and Army Voting case*, 2014, para [3.18]).

Despite finding that lawmakers had discretion to restrict these voting rights, the Court found Article 260 partially invalid for legal uncertainty. The Court erased '2009' from the provision, thereby clarifying that the provision applied also to subsequent elections, including the 2014 presidential elections.

2 Party Establishment and Verification

As mentioned in Chapter 7, to contest elections, parties must be 'verified' – they must be formally established as a political party and enjoy a minimum level of representation across Indonesia's provinces, districts and cities. These requirements have, with some exceptions, gradually tightened as electoral laws were amended or replaced after each election.[14] This has primarily disadvantaged both new parties and old parties that failed to obtain a minimum number of votes in previous elections – an issue covered later in this Chapter.

The first Political Parties Law enacted after Suharto's fall – Law 2 of 1999 – required only that political parties be established by at least 50 people; that all citizens be formally permitted to join the party; that the party program comply with Indonesia's national ideology, *Pancasila*; and that the party be established by notarial deed and registered with the Department of Justice (Article 4(1)). The second Political Parties Law – Law 2 of 2002 – maintained these requirements and added two more: a fixed office, and a verifiable regional presence. In particular, the party needed to demonstrate that it had regional chapters or offices in 50% of Indonesia's provinces, in 50% of counties or cities within those provinces, and in 25% of the sub-districts within those counties or cities (Article 2(3)(b)).

Article 7 of the 2003 General Election Law then required that, to compete in elections, parties meet the establishment requirements of the 2002 Political Parties Law just mentioned. It also imposed further conditions. These were that parties have a 'complete executive' (*pengurus lengkap*), with a fixed office, in at least two-thirds of Indonesia's provinces and in at least two-thirds of counties or cities in those provinces; and at least 1000 members or at least one

14 This process was discussed in Chapter 7.

member for each 1000 citizens in that province. The KPU examined whether parties met these requirements (Article 7(3) of the 2003 General Elections Law).

The Constitutional Court has heard many challenges to party establishment and verification requirements. The *Party Verification case* (2003) appears to have been the first. The applicant was the chairperson of a small party – the Indonesian People's Unity Party (*Partai Persatuan Rakyat Indonesia* (PPRI)). The KPU had refused to allow the PPRI to contest the 2004 legislative elections for failing to satisfy Article 2(3) of the 2002 Political Parties Law, which required the party to meet the representation requirements, have fixed offices, and be registered with the Department of Justice. One of the applicant's arguments was that these requirements made establishing a party so difficult that they undermined the constitutional right to associate and precluded parties from competing in elections.

The Court rejected the application, unusually beginning its decision with the dissenting judgments.[15] Justices Fadjar and Siahaan, in a joint dissent, argued that the application should be upheld, at least in part. The requirements were 'so onerous that they tended to impede the existence of political parties as instruments of democracy and as a manifestation of the freedom to associate' (*Party Verification case*, 2004, p. 30). The judges added that, because the Constitution does not specifically mandate the enactment of a statute on political parties, the content of the 2002 Political Parties Law could not impede the freedom to associate. They were also concerned that the verification requirements excluded smaller local parties from competing in national elections, apparently contradicting Article 18(5) of the Constitution ('Regional governments are to exercise the broadest autonomy…').

Justice Harjono, in sole dissent, similarly affirmed that political parties were an important means by which citizens exercised their 'fundamental' right to associate (Article 28E(3)). He added that because the Constitution gave parties a significant role in the democratic process,[16] the prerequisites should not preclude citizens from establishing them. (After all, he continued, the real test should be whether parties can garner enough votes in elections to obtain seats in parliament, rather than meet these administrative requirements.) For him, there was no compelling reason to make establishing political parties more

15 To my knowledge, this is the only judgment in which the minority decisions have preceded the majority opinion.

16 In particular, Article 28E(3) states that participants in general elections are political parties.

difficult. Article 28J(2) of the Constitution could not, therefore, be applied to excuse violating the right to associate.

By contrast, a six-judge majority refused to invalidate the impugned provisions.[17] For them, Article 2(3) of the 2002 Political Parties Law sought merely to ensure that political parties were credible and enjoyed some support. And, far from preventing parties from being established, the verification requirements required the government to recognise the parties that met them, thereby guaranteeing the rights to associate and express an opinion. Article 2(3) should not, therefore, be interpreted as restricting the freedom to establish a political party.

Further, Article 2(3) was not discriminatory, because it applied to all political parties. And even if did breach citizens' human rights, this was justifiable under Article 29(2) of the Universal Declaration of Human Rights.[18] Without much explanation, the majority declared that Article 29(2) is designed to ensure that the exercise of freedoms by one person or group does not impede those of others.

In 2008, the 2002 Political Parties and 2003 General Election Laws were replaced. The 2008 Political Parties Law retained the establishment requirements from the 2002 Political Parties Law, but increased the provincial representation threshold from 50% to 60%. The required representation for counties and cities within those provinces, and for sub-districts within those counties/cities, remained at 50% and 25% respectively.

However, the 2011 Amendments to the 2008 Political Parties Law made establishing new political parties far more difficult, adopting requirements similar to those imposed by the 2003 General Election Law upon parties seeking to 'compete' in elections. A new party now requires almost 1000 founders (30 from each province), though only 50 of them are required to represent these founders for registration purposes (Article 2(1)). Perhaps most significantly, the 2011 Amendments increased the regional representation thresholds to all provinces, 75% of counties/cities within those provinces, and 50% of sub-districts within those counties/cities (Article 3(2)(c)).

These amendments prompted several constitutional challenges, two of which I discuss here. The first was the *Party Establishment case* (2011). The

17 Justices Jimly Asshiddiqie, Laica Marzuki, Natabaya, Soedarsono, Achmad Roestandi, and I Dewa Gede Palguna.

18 The Court did not mention Article 28J(2) of the Constitution here, which roughly reflects Article 29(2) of the Universal Declaration of Human Rights. Although, as mentioned in Chapter 3, the Court commonly resorts to norms of international conventions to support decisions, it is unusual for the Court to do so without mentioning the domestic legal source for the norm, where it exists.

applicants – nine individuals, including journalists, private sector employees, retired DPR members and a 'housewife' – challenged the party establishment and regional representation requirements, again on grounds that they were excessive. (They also challenged Article 51(1) of the 2011 Political Parties Law Amendment, an aspect of the case considered below.) While the Court acknowledged that the 2011 Amendments imposed more onerous establishment requirements than the 2003 and 2008 iterations, it did not find them excessive. Rather, the 1000-founders requirement was appropriate given Indonesia's increasing population. In any event, smaller parties could find 30 founders in each province. As for the regional representation requirements, the Court decided that they were objective and constituted a 'genuine and democratic effort to simplify Indonesia's multi-party system' (*Party Establishment case*, 2011, p. 24).

A slightly different argument was run in the *Party Establishment case* (2012), brought by two individual citizens. Again, this was a challenge to the regional representation requirements, but the arguments differ from those in earlier cases. The applicants argued that the requirements made establishing a political party too expensive, thereby impeding their constitutional rights to associate and collectively struggle for their rights and interests. And, they argued, because the requirements disadvantaged parties with fewer financial resources, they were also discriminatory. The applicants also objected to political parties needing to be national (Article 1(1) of the 2011 Political Parties Law), arguing that this sidelined regional interests. They asked the Court to remove this requirement from Article 1(1) so that citizens could elect members of locally-based parties to their local legislative assemblies and as their heads of local governments.

The Court rejected all these arguments, holding that the impugned provisions fell within the 'corridor of constitutionality'. For the Court, requiring parties to be national did not undermine or diminish the right to associate and to participate in government. Every person remained able to associate by forming a political party, including parties sensitive to regional needs, provided that the party had a national presence. Further, the Law was not discriminatory because it applied equally to all citizens wishing to form a party. Even though the Court found that the Law did not violate constitutional rights, it held that Article 28J(2) of the Constitution permitted restrictions on those rights in any event.

3 Contesting the 'Next Election': *The Election Threshold* Cases

The 2003 General Elections Law included provisions directed at parties that had contested previous elections held in 1999. Article 9(1) prohibited them

from standing in the next election – that is, the 2004 election – unless they had obtained at least 3% of DPR seats in 1999; at least 4% of seats in provincial parliaments across half of Indonesia's provinces; or at least 4% in county or city parliaments in half of Indonesia's counties or cities. Parties not reaching these thresholds could not compete in 2004 unless they joined with an existing party that met the threshold, or merged with other parties so that, with their combined vote totals, they reached it (Article 9(2)).

Sherlock (2009, p. 12) notes that these prohibitions were largely ineffective. Parties that did not meet the threshold but wanted to contest the next election without joining with another party simply altered their party name and registered as a new party. However, not all parties were willing or able to do this. More than a dozen that faced exclusion in 2004 challenged the thresholds in the *Next Election Threshold case* (2007).

The applicants put forward several constitutional arguments, all of which the Court rejected. First, they argued that the threshold precluded them from participating in elections along with other parties, and so violated their right to equality and was discriminatory.[19] According to the applicants, once parties had met the statutory establishment requirements, the DPR could not then prevent them from contesting. Doing so threatened the existence of these parties. The Court disagreed, holding that Article 9 contained 'objective' requirements for all parties who had already contested an election and wished to participate in another. Whether a political party met the electoral threshold depended on support from voters, not on perceived defects in the statute. And, the Court held, even if the threshold was discriminatory, it was not discriminatory in the sense intended by the ICCPR.

Second, the applicants argued that the threshold 'arbitrarily' revoked their right to participate in developing democracy through elections, thereby violating Article 28C of the Constitution ('Every person has the right to advance themselves and to struggle for their rights collectively to develop the community, nation and state'). Again, the Court disagreed: the applicants could enjoy this right, including by participating in the next election, provided that they met the threshold. Indeed, for the Court, meeting the Article 9(2) threshold made collective action more 'imposing' (*dahsyat*).

In coming to its decision, the Court held that the requirements for both party establishment (imposed in the 2002 Political Parties Law) and electoral

19 Article 27(1): 'Every person has the right to legal recognition, guarantees, protections and certainty which is just and to equal treatment before the law'; Article 28I(2): 'Every person has the right to be free from discriminatory treatment'.

participation, including administrative verification (imposed in the 2003 General Election Law), fell within the 'open legal policy' of lawmakers.

In the 2008 General Election Law, the DPR dropped the prohibition on poorly-performing parties contesting subsequent elections. A party that had contested the most recent election could automatically contest the next election (Article 8(2)). Instead, a parliamentary threshold was imposed. As discussed later in this Chapter, this precluded parties from obtaining seats unless they garnered a minimum percentage of votes across Indonesia. The maximum number of seats contested in many electoral districts was also reduced. These two changes made smaller parties unlikely to obtain seats in ways they had relied upon in the past – that is, by having just enough votes to pick up a seat or two after most seats had already been allocated to bigger parties (Sherlock, 2009, p. 12).

However, the 2011 Political Parties Law and Article 8 of the 2012 General Election Law re-established the 'next election' threshold established in the 2003 General Election Law. Article 8(1) of the 2012 General Election Law states that political parties who contested the most recent general election and met the parliamentary threshold could contest the next general election. New political parties and political parties that fell short could compete only if they met various prerequisites set out in Article 8(2). These prerequisites mirrored the prerequisites imposed in the 2011 Political Parties Law mentioned in the previous section, including being recognised as a legal entity, having regional representation (that is, fixed offices or chapters in all provinces, in 75% of cities and counties in those provinces, and in 50% of sub-districts in those cities and counties), and 1000 members. In other words, these parties needed to undergo the complex and time-consuming verification process again, whereas the more established parties did not.

In the *Parliamentary Threshold and Party Verification case* (2012), twenty-two small parties, which did not meet the threshold in the 2008 elections, challenged the constitutionality of Article 8(2) of the 2012 General Elections Law. (They also challenged the parliamentary threshold, discussed later in this Chapter.) The applicants argued that Article 8(2) should apply only to new parties and they asked the Court to exclude from its operation parties that did not meet the threshold.

The Court decided that Article 8(2) was unconstitutional and that the KPU must verify all political parties – even the larger established parties that had met the parliamentary threshold in the most recent election. Having different verification rules for parties contesting the same election was 'unfair' (*Parliamentary Threshold and Party Verification case*, 2012, p. 93). New parties were treated unfairly in two ways. First, they were subject to stricter

verification processes than parties that had contested the 2009 elections (*Parliamentary Threshold and Party Verification case*, 2012, p. 91), for which, as mentioned, the previously-applicable verification requirements had been relaxed. Second, older parties that met the threshold did not need to seek re-verification. Even though the Court declared that it 'understood the intent of lawmakers to simplify the number of political parties', to impose different requirements upon different political parties was constitutionally impermissible (*Parliamentary Threshold and Party Verification case*, 2012, para [3.22]). Rather, all political parties contesting the same election needed to be subject to the same administrative requirements. Article 8(2)'s differential treatment therefore violated Articles 27(1) and 28D(2) and (3) of the Constitution.

Even though the Court upheld the challenge, its decision went far beyond what the applicants had sought in their application. On the same grounds, the Court also removed Article 8(2)'s reference to *new* political parties. The result: all political parties contesting the 2014 elections – new, old, small and big – needed verification or re-verification. Article 8(2) now reads 'political parties can contest elections after fulfilling the following requirements', after which the verification requirements follow.

The Court's decision does not sit comfortably alongside previous decisions, discussed above, that prerequisites were constitutional if 'objective' and applicable to all parties. In particular, Article 8(2) applied equally to all new parties and all old parties that had failed to meet the threshold. Further, even if Article 8(2) discriminated between parties, it did not fall within any of the categories of impermissible discrimination. In many other cases, the Court has similarly rejected claims of discrimination because they fall outside these categories.[20]

4 The Parliamentary Threshold

As mentioned in Chapter 7, one way the DPR has employed to reduce the number of parties occupying seats in Indonesia's national and regional parliaments has been by imposing a 'parliamentary threshold'. This is the percentage of valid votes a party must obtain nationally to be allocated *any* seats in the national parliament. Even if a party obtains enough votes in a particular electoral district to meet the 'seat quota' – that is, the number of votes required to

20 See, for example, the *Muhlis Matu* (2007); and *Parliamentary Threshold* (2009, para [3.17]) cases.

obtain a DPR seat in a given electoral district – that party cannot take up the DPR seat unless it has also met the national parliamentary threshold.[21]

While the 1999 and 2004 General Election Laws imposed no such threshold, the 2008 General Election Law imposed a parliamentary threshold of 2.5% of the national vote (Article 202(1)). Importantly, this threshold applied only to seat allocations for the national parliament, but not in DPRDs (Article 202(2)). For regional parliaments, seats continued to be allocated based solely on the relevant seat quota – that is, the number of votes required to obtain a seat in that regional parliament.

The 2012 General Election Law aimed to further reduce the number of political parties in both national and regional parliaments by increasing the threshold and applying it to DPRD as well as DPR seat allocations. Article 208 reads:

> Political parties contesting the election must meet the parliamentary threshold [literally, the 'threshold to obtain a seat'] of at least 3.5% of the number of national valid votes to participate in the allocation of seats for membership to the DPR, provincial DPRDs and county/city DPRDs.

Article 209(1) reads:

> Political Parties that do not meet the parliamentary threshold referred to in Article 208 are not to be included in the allocation of DPR, provincial DPRD and county/city DPRs seats…

4.1 Parliamentary Threshold Case (*2009*)

Parliamentary thresholds are employed in other countries and have been the subject of constitutional challenge, including in Germany, the Czech Republic and Romania (Issacharaoff, 2011, p. 976). In Indonesia, the parliamentary threshold employed in the 2008 General Election Law was first challenged in the *Parliamentary Threshold case* (2009). This case was brought by 11 smaller parties wanting to participate in the 2009 elections, along with some of their legislative candidates and members as individual applicants.

Perhaps their strongest argument was that the threshold system involved 'discarding' the votes of citizens for parties that did not meet the threshold, 'causing citizens to lose their votes and aspirations'. For the applicants, this violated Article 1(2) of the Constitution, which places sovereignty in the hands of the people. In other words, votes for parties that do not meet the threshold become nullities, thereby preventing those voters from exercising the

21 The seat quota concept is discussed later in this Chapter.

sovereignty granted to them by Article 1(2). A seven-to-two majority disagreed, however, holding that the people exercised their sovereignty by voting, thereby determining who met the threshold. The DPR and the government set the threshold, but they did not determine whether a particular party fulfilled it (*Parliamentary Threshold case*, 2009, para [3.17(a)]).

The applicants also argued that the threshold discriminated against DPR candidates whose parties did not obtain sufficient votes to meet it, thereby breaching Articles 27(1), 28D(1) and (3) of the Constitution. Again, the majority disagreed, holding that the threshold:

> did not ignore human rights principles contained in Articles 28D(1) and (3)…because every citizen and every party contesting the election, is treated the same and has the same opportunity through democratic competition in the election. Some might be successful, and others not so successful…but their chances and opportunities were the same.
>
> *Parliamentary Threshold case*, 2009, para [3.17]

Predictably, the majority also held that Article 202(1) did not differentiate on any basis prohibited under the 1999 Human Rights Law and the ICCPR (*Parliamentary Threshold case*, 2009, para [3.17]).

The applicants also claimed that the threshold was discriminatory because it was not applied against provincial and city/county DPRDs. The majority rejected this argument, also holding that applying the threshold to the DPR but not to DPRDs was proportional rather than discriminatory. Even though the DPR and DPRDs are both parliaments, their relative positions and powers differ significantly. On the one hand, the DPR is a national institution with significant powers, including to enact statutes that apply across Indonesia. It also functions as a counterbalance to the exercise of presidential power. On the other hand, DPRDs are part of the regional government and subject to central government controls (*Parliamentary Threshold case*, 2009, para [3.17(c)]). (The majority's rejection of this argument was not convincing. In particular, it did not explain why these differences made imposing the threshold proportional for the DPR but not for DPRDs.)

Finally, the applicants argued that the threshold damaged the right to equal opportunity in government. Candidates of political parties that did not meet the threshold *nationally* would not receive a parliamentary seat. Yet a candidate from another party competing in the same electoral district might obtain a seat, even though he or she garnered fewer votes, simply because his or her party did meet the threshold. On my reading, the majority did not directly respond to this argument. However, perhaps the majority considered that it

had done so by declaring that the threshold was not discriminatory because it applied equally to all election participants.

Noting that 'Everywhere in the world Constitutions give power to lawmakers to limit the implementation of the people's political rights by statute' (*Parliamentary Threshold case*, 2009, para [3.19]), the majority concluded:

> …the parliamentary threshold is constitutional. The size of the threshold falls within the jurisdiction of lawmakers to determine without intervention by the Constitutional Court, provided that it does not contradict political rights, the people's sovereignty and rationality.
>
> *Parliamentary Threshold case*, 2009, para [3.19]

Justices Siahaan and Mochtar issued separate dissenting opinions. For Justice Siahaan, the threshold violated the 'norms, spirit and soul' of the Constitution, including Article 1(2), which he described as the 'basic norm for the life of the state [which must be] strongly held'. He continued:

> The sovereignty of the people is the source of legitimacy for all laws that regulate elections…and must be implemented in accordance with the Constitution, however difficult this may be. This requires lawmakers to always start from the basic principle that the highest authority lies in the hands of the people as citizens. The basic rights that they have and that are contained in the Constitution are not a gift of the nation or the government, but attach to those citizens because of their nature. [These human rights include] the right to vote and to stand in order to participate in government. This is the right to put forward oneself in the collective struggle for rights in building the community, nation and state, with equal treatment or non-discrimination. A constitutional democracy guarantees equal opportunity for citizens to participate in determining the direction and policies of government in order to achieve the purposes of the state…even though this is not always done directly, but rather through the system of representation.
>
> *Parliamentary Threshold case*, 2009, p. 134

For Justice Siahaan, the 2.5% parliamentary threshold disregarded the people's sovereignty, exercised when citizens voted for their representatives. And the interest used to justify the threshold – simplifying the party system – was outweighed by the importance of the people's sovereignty and constitutional rights. If a threshold were applied at all, it should be applied *before* the election to restrict political parties that could participate. Applying it after

the election nullified the votes that citizens had already cast. For Justice Siahaan, the threshold breached Articles 1(2), 27(1), 28C(2) and 28D(3) of the Constitution.

Like Justice Siahaan, Justice Mochtar emphasised the people's sovereignty, calling it the 'primary principle of the Constitution' and the 'morality of the Constitution'. However, he also found the threshold to be discriminatory, largely because it applied to members of the DPR but not to members of DPRDs. He would also have invalidated Article 202 for having an unclear rationale, causing legal uncertainty and being unjust, thereby breaching Article 28D(1) of the Constitution – though, for this reader at least, his reasons for reaching these conclusions were not clear.

4.2 Parliamentary Threshold and Party Verification Case (*2012*)

As mentioned, the 2008 General Election Law was replaced in 2012. The 2012 Law increased the parliamentary threshold from 2.5 to 3.5% and applied it to the allocation of DPRD seats. These changes, along with the 2012 General Election Law's provisions on party verification discussed above, were challenged in the *Parliamentary Threshold and Party Verification case* (2012).[22] The Court referred to previous decisions, including the *Parliamentary Threshold case* (2009) where it upheld a 2.5% parliamentary threshold, and decided that its reasoning applied equally to the 3.5% threshold.

However, despite upholding the threshold for the national parliament, an eight-to-one majority held that it was unconstitutional to apply the 3.5% threshold when allocating seats in subnational parliaments – that is, provincial, city and county DPRDs.[23] Under the 2012 General Elections Law, whether a party met the threshold was determined entirely by the votes it obtained *nationally*. A party might be popular in one region – it might even obtain a majority of the votes there – but unless it obtained 3.5% of the national vote it would receive no seats in the *regional* parliament. A local parliament might ultimately be filled with parliamentarians from parties for which few citizens voted in that region, purely because no other parties met the threshold nationally (*Parliamentary Threshold and Party Verification case*, 2012, p. 98). For the majority, Article 208 failed to accommodate, and even impeded, political aspirations across Indonesia's diverse regions. These legitimate aspirations could

22 Several similar challenges were lodged around the same time, including the *PNI case* (2012) and the *NasDem* case (2012). These cases are not discussed here given that the Court declared that its decision in the *Parliamentary Threshold and Party Verification case* (2012) applied *mutatis mutandis* to them.

23 With Akil Mochtar dissenting.

not be overridden in pursuit of simplifying the party system. The majority declared that the provision:

> breached principles of people sovereignty, political rights and rationality and therefore also breached the purpose of general elections themselves, that is to elect people's representatives from the centre through to the regions.[24]
>
> *Parliamentary Threshold and Party Verification case*, 2012, pp. 98–99

Now that the Court has removed the reference to DPRDs from Article 208, it reads: 'Political parties that contest the election must obtain at least 3.5% of all valid votes cast nationally to be eligible to receive seats for the national parliament'.[25]

5 Electoral Districts and Seats Allocation

As mentioned in Chapter 7, Indonesia is divided into electoral districts. For the 2014 legislative elections, there were 77 districts. They are listed in the Appendix to the 2012 General Elections Law, which also specifies the cities and counties falling within each district. The 77 electoral districts do not contain the same number of voters or seats. In 2014, for example, national legislative seats in some districts were worth around half a million votes, while others were worth closer to 250,000 (Surbakti, 2014). Each district fills between 3 and 10 seats. The electoral districts are not spread evenly across Indonesia, with 39 of the 77 districts in six provinces in densely-populated Java, and 38 districts in 27 provinces outside Java (Surbakti, 2014).

In the *Electoral District case* (2012), the Association for Elections and Democracy (*Perludem* or *Perkumpulan Untuk Pemilu dan Demokrasi*) and the Indonesian Parliamentary Center challenged the electoral district system. They argued that the system was discriminatory, therefore violating Article 27(1), because the votes of citizens in some electoral districts were worth more, or less, than the votes in others. They argued that the number of seats contested in each district should be the same and that electoral districts should be

24 This statement recalls the grounds referred to in dissent in the *Parliamentary Threshold case* (2009), but the majority did not expressly draw from it.

25 Even though the applicants did not ask the Court to do so, the Court also amended Article 209 because it referred to Article 208.

determined using population data rather than ideological, religious or cultural divides.

The Court held that delineating electoral districts fell within lawmakers' discretion under Article 22E(6) of the Constitution. In any event, the 2012 General Election Law ultimately respected the 'one man [sic] one vote' principle because each vote was equal in the electoral district in which it was cast. Of course, the precise number of votes needed to obtain a seat in one district would usually differ from the number needed in another, but for the Court this was one negative aspect of an otherwise acceptable system.

5.1 *Seat Allocation*

An important step in allocating national and regional parliamentary seats is determining the 'seat quota' (*Bilangan Pembagi Pemilu* (BBP), literally 'Vote Division Number'). This is obtained by dividing the number of valid votes cast in a particular electoral district by the number of seats allocated that to district (Articles 205(1) and (2) of the 2008 General Election Law). This quota will inevitably differ between electoral districts, given the variation in the number of eligible voters and contested seats in the districts.

The process by which DPR seats are allocated initially is straightforward: each time a party meets the quota, it receives a seat (Article 205(3)). However, less clear has been how 'leftover' seats should then be allocated. At the heart of the uncertainty has been the interpretation of Article 205 of the 2008 General Election Law. Article 205(4) states:

> If there are still leftover seats, a second-round seat allocation takes place by dividing the number of seats not yet allocated to parties that obtained votes comprising at least 50% of the seat quota for the DPR.

If leftover seats remain after the second-round allocation, a third round takes place in which all the surplus votes are collected in each province to determine a new seat quota in that province (Article 205(5)). Again, this quota is determined by dividing the number of leftover votes by the number of unallocated seats (Article 205(6)). Parties who meet the new quota are then awarded seats in the DPR (Article 205(7)).

As mentioned, the KPU issues guidelines on electoral administration. To this end, in the month before the 2009 legislative elections, the KPU issued 'Regulation 15 of 2009 on Technical Guidelines for the Determination and Announcement of the General Elections Results, Procedures to Stipulate Seat Allocations, Stipulation of Elected Candidates and the Replacement of Elected Candidates, in Elections for the DPR, DPD, Provincial DPRDs and County/City

DPRDs in 2009'. Seemingly mirroring Article 205 of the 2008 General Election Law, Article 22(c) of this Regulation states that DPR seats are first allocated using the seat quota and that any leftovers are then distributed in a second round. Under Article 23(1) of the Regulation, parties with leftover votes meeting 50% of the quota receive a seat in that second round. If leftover votes and seats remain, they are allocated to the parties with the most leftover votes in a third round (see Article 23).

Several Democratic Party members, who thought that they missed out on a seat because of this allocation process, challenged the validity of the KPU Regulation in the Supreme Court, arguing that Articles 22 and 23 of the Regulation contradicted Article 205 of the General Election Law.[26] (As discussed in Chapter 4, the Constitutional Court lacks jurisdiction to review these types of lower-level regulations.) The applicants' favoured interpretation of Article 205 was that parties who had received seats in the first round participated in the second round with all their valid votes, not just the leftovers.[27] The Supreme Court agreed and invalidated the Regulation.[28] The Supreme Court's interpretation of Article 205 meant that votes for the major parties would, in effect, be counted twice: once to determine whether they had met the quota for a seat in the first round, and again, to determine how many of the 'remainder' seats they would obtain in the second round and the third, if necessary. The Supreme Court's decision was questionable, not least because the Court appeared to ignore the clear words of the 2008 General Election Law and failed to explain how the statute and KPU Regulation were contradictory when they were, in fact, very similar.

Nevertheless, the ramifications of the Supreme Court's decision were clear: 66 seats would be reallocated in the DPR, and around 1,300 in regional parliaments. Major parties were obvious beneficiaries, with Susilo Bambang Yudhoyono's Democratic Party set to gain an additional 31 seats in the DPR, and PDI-P and Golkar gaining between 16 and 19 seats each. Small parties, such the United Development Party (*Partai Persatuan Pembangunan* or PPP), Prosperous Justice Party (*Partai Keadilan Sejahtera* or PKS), *Gerindra* and *Hanura* would all lose seats.

5.2 *Sisa Suara Case* (2009)

These smaller parties mounted a challenge before the Constitutional Court – the *Sisa Suara case* (2009) – asking it to reverse the Supreme Court judgment.

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26 Supreme Court Decision 15 P/HUM/2009. Also lodged, on similar grounds but by different applicants, were Supreme Court Decisions 012 P/HUM/2009 and 016 P/HUM/2009.

27 Supreme Court Decision 15 P/HUM/2009, p. 7.

28 Supreme Court Decision 15 P/HUM/2009, p. 15.

A preliminary matter was whether the Constitutional Court could hear the case. Near the beginning of its judgment, the Court explicitly recognised that it lacked power to review Supreme Court decisions and KPU Regulations. However, it circumvented this by instead focusing on whether the 2008 General Election Law, which the KPU Regulation had sought to implement, complied with the Constitution.

The Constitutional Court found that Articles 205(4), 211(3) and 212(3) of the 2008 General Election Law were unclear and that, in particular, the word 'vote', as used in Article 205(4), was susceptible to one of at least three meanings. First, it could refer to votes already counted in the first round. Second, it could refer to the number of votes a party had remaining after votes had been allocated to meeting the seat quota. Third, it could refer to votes that did not meet the initial quota, but exceeded 50% of that quota. For the Court, this multi-interpretability – evident from the differences between the KPU Regulation and the Supreme Court decision – had caused 'significant controversy in the community' and violated the constitutional guarantee of legal certainty (*Sisa Suara case*, 2009, para [3.3]).[29]

The Court decided that 'votes' in Article 205(4) referred to votes that had not yet been 'converted' into a seat, giving three reasons (*Sisa Suara case*, 2009, p. 103). First, this interpretation 'acknowledged' the votes obtained by smaller parties.[30] Presumably, the Court's view was that Article 1(2), which placed sovereignty in the hands of the people, required that all votes – even those for minor parties – must be given due weight. However, the Court did not expressly draw this conclusion.

Second, this interpretation corresponded with the original intent of lawmakers who enacted the 2008 General Election Law. Ferry Mursyidan Baldan, Head of the DPR Special Committee (Pansus) that drafted the Law, had appeared before the Court. He testified that 'vote', as used in Article 205(4), meant 'votes that were obtained by parties over and above the quota' and 'votes that had not been used in the allocation of seats' in the first round (*Sisa Suara case*, 2009, p. 101).

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29 For a detailed discussion of legal certainty, see Chapter 6.

30 To support this statement, the Court set out a quote from a book written by former President of the Supreme Court of Israel, Aharon Barak on *Purposive Interpretation in Law* (2005, p. xix) about the concept of democracy: 'a delicate balance between majority will, on one hand and fundamental values and human rights on the other. Subjective purpose reflects majority will, objective purpose reflects fundamental values and human rights'. However, the Court did not explain how this quote related to its decision.

Finally, this interpretation, unlike the Supreme Court's, was consistent with Indonesia's proportional representation system, established by Article 5(1) of the 2008 General Election Law. In the words of the Court, this system 'aims to establish a proportionality or closeness between the percentage of votes and… seats obtained, with the smallest possible deviation' (*Sisa Suara case*, 2009, pp. 101–102). Other interpretations allowed parties who met the seat quota to have their votes counted twice – once to meet the quota, and then again when allocating leftover seats (*Sisa Suara case*, 2009, para [3.31]).

However, instead of invalidating Article 205(4) the Constitutional Court held it to be 'conditionally constitutional' – that is, valid, if *applied* in line with the Court's own interpretation of it. This was that the KPU allocate seats after the 'first round' as follows:

1. Determine…50% of the seat quota in every electoral district for DPR elections.
2. Distribute the remaining seats in every DPR electoral district to political parties contesting those elections as follows:
    A. If the number of valid votes or leftover votes of the political party exceeds 50% of the quota, then that political party obtains one seat.
    B. If the number of valid votes or leftover votes of the political party does not reach 50% of the quota and there are still leftover seats:
        1. The valid votes of the parties are categorised as leftover votes counted in the allocation of seats in the third round;
        2. The valid votes of political parties are counted in the third-round count for seats.

(As mentioned, under Article 205 of the General Elections Law and Article 23 of the KPU Regulation, any leftover seats were then allocated to parties with the most leftover votes remaining until no seats remained.)

The Court took a similar approach to Articles 211(3) and 212(3) of the 2008 General Election Law, which sets out how seats are allocated in provincial DPRD and county/city DPRD elections respectively.[31] These provisions

31 On the different processes for DPR and DPRD vote allocations, the *Papua Provincial DPRD election case* (2009) is worthy of brief note. This challenge was mounted by Habel Rumbiak, a candidate for the Papua Provincial DPRD from the Democrat Party. He pointed out that seats in provincial DPRDs were allocated in two rounds under Article 211, whereas DPR seats were allocated in three rounds under Article 205. For him, this was discriminatory: the same allocation processes should apply for distributing seats in both DPR and DPRD elections. As in the *Parliamentary Threshold case* (2009), the Court held

established the same allocation process as did Article 205(4) for DPR elections, but without having a 'second round'. Seats were allocated using the seat quota and then any leftover seats were distributed to the parties with the most leftover votes until no more seats remained. Again, the Court emphasised that 'leftover votes' in these provisions meant votes that had not been 'used' to obtain a seat in the previous round. These were either votes held by parties that had more votes than the quota, or the votes obtained by political parties that did not meet the quota. Seats would be allocated to the party with the most votes until no seats remained (*Sisa Suara case*, 2009, p. 103).

The Court held that Articles 211(3) and 212(3) were constitutional provided that they were applied using the following process:

1. Determine the number of seats not yet allocated, by subtracting the number of seats already allocated in the first round from the number of available seats in the provincial, city or council DPRD electoral district.
2. Determine the number of valid leftover votes of the parties that competed in the provincial, city or council DPRD in the following way:
   A. For political parties who obtained seats in the first round, the number of votes already used to allocate seats is subtracted from the total number of valid votes obtained by the party.
   B. For political parties that did not obtain seats in the first round count, the valid votes obtained by the political party are categorised as leftover votes.
3. Allocate leftover seats to political parties that contested the provincial/city/council DPRD elections that have the most [leftover] votes, one by one, until no seats remain.

5.3 Third-Round Allocation Dispute (*2009*)

In the aftermath of the 2009 elections, six parties[32] objected to how the KPU had allocated legislative seats in a third round of distributions under Article 205 of the 2008 General Election Law. The applicants complained that the KPU had not, in that third round, pooled leftover seats remaining across all provinces for distribution to the highest vote-getters, but rather had distributed only seats in electoral districts with leftover seats.

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that the DPR and DPRD had different functions and could, therefore, be treated differently. In any event, the alleged discrimination did not fall within any of the recognised categories of discrimination under the ICCPR.

32 *Gerindra*, *Partai Amanat Nasional*, *Partai Persatuan Pembangunan*, *Partai Kebangkitan Bangsa* and *Golkar*.

The Court agreed that the KPU had erred, and set out an eight-step process for distributing leftover seats under Article 205(5). The Court decided that:

> The correct way of applying the stages of Article 205(5), (6) and (7) of the [2008 General Election Law] according to the Court is as follows:
> 1. Stage III is carried out if, after stage II, seats remain that have not been allocated in the relevant provincial electoral district.
> 2. If the province comprises an electoral district, then the remaining seats are directly allocated to political parties obtaining the most leftover votes in that district.
> 3. All valid leftover votes – that is, votes not used in stage I and stage II from all provincial electoral districts – are added up and divided by the number of leftover seats in all provincial electoral districts to obtain a new seat quota.
> 4. Political parties that have more leftover votes…than the seat quota, have a right to obtain a leftover seat that has not yet been allocated.
> 5. Seats allocated in stage III must be allocated in electoral districts which still have leftover seats.
> 6. DPR candidates entitled to seats are candidates who obtain the most votes in electoral districts that still have remaining seats and who are nominated by political parties that have rights to leftover seats.
> 7. If there is only one seat left unallocated in a province, then the political party with the most leftover votes in that province obtains that seat.
> 8. If after the stage III seat quota has been determined no party meets the quota, seats are then allocated to those who have the most leftover votes in the province.
>
> *Third-Round Allocation Dispute*, 2009, para [3.21]

The 2012 General Election Law did away with the second-round allocation method of distributing seats to parties reaching 50% of the quota. Article 212(a) states that parties meeting the quota receive a seat. If leftover seats remain, they are allocated one by one to parties with the most leftover votes until all seats are filled (Article 212(c)).

6 The People versus the Parties

Another fertile area for constitutional challenge in Indonesia has been the extent to which political parties can control which of their members or

candidates represent the party in parliament. This question has arisen in two primary circumstances.

The first is when, using the votes they obtained from an election, parties allocate parliamentary seats to their candidates. As mentioned in Chapter 7, Indonesia has experimented with various 'list systems'. In the 1999 election, a 'closed-list' system was employed, under which citizens could not vote for an individual. They could only vote for a political party, which allocated seats to its preferred candidates in the order the party ranked them on a candidate list. This meant that a party could allocate seats to candidates who received fewer votes than others. For the 2003 election, a candidate could only guarantee him or herself a seat, regardless of his or her position on the party candidate list, by obtaining enough votes as an individual to meet the seat quota. Otherwise, the party could allocate any seats it obtained to candidates according to its candidate list. By the 2009 election, however, citizens could vote for an individual candidate, a party, or both. Parties could still use their party votes to allocate seats to their preferred candidates. However, individual candidates could guarantee any seat the party obtained by receiving 30% of the seat quota, regardless of their position on the candidate list, rather than the previously-required 100%.

The second circumstance is when a party seeks to 'recall' a serving member mid-term. Under Indonesia's various election laws, members lose their parliamentary seat if the political party that nominated them cancels their membership. A party could, therefore, unilaterally replace a member, even if he or she met the 30% requirement. I now turn to discuss how the Constitutional Court has addressed these issues.

6.1 *The List Cases*

6.1.1 *Open List Case* (2004)

The earliest case about the constitutionality of allocating seats using party candidate lists was the *Open List case* (2004), brought by several individuals, including NGO activists, lecturers, voters and parliamentary candidates. They challenged the open-list system established under Article 107 of the 2003 General Election Law. (As mentioned, under the Law individual candidates could secure a seat only by meeting the 'seat quota' themselves as individual candidates. If they did not, whether they received a seat depended on their position on the candidate list (Article 107(2)(b)). The higher the candidate on the list, the more likely he or she would be allocated a seat, even if candidates lower on the list obtained more votes.) The applicants argued that the list system was discriminatory because it gave special treatment to candidates higher on the list. They also argued that it violated Article 1(2) of the Constitution

('Sovereignty is in the hands of the people'), because the candidates obtaining seats in parliament had not necessarily received the most votes in their electoral district.

The Court rejected the application without squarely addressing these arguments. It simply held that Article 22E(6) of the Constitution gave the national parliament power to enact Article 107 of the 2003 General Elections Law. Because the Constitution did not require a particular electoral system to be used in Indonesia, the national parliament could choose the system – whether district, semi-proportional or proportional, or a variation on them – provided that it was democratic. The DPR had, in the 2003 General Election Law, legitimately chosen the proportional system with an open list (*Open List case*, 2004, p. 26). For the Court, every system had natural advantages and disadvantages, but, overall, the open-list system was not discriminatory or undemocratic.

6.1.2 *Open List Case* (2008)

In the *Open List case* (2008), the Constitutional Court invalidated a variant of the list system that it had upheld in the *Open List case* (2004). In so doing, the Court issued perhaps its most far-reaching and controversial decision about Indonesia's legislative election system. The challenge was brought by four applicants associated with the Democrat Party (Viva News, 2011). They objected to Articles 214(a)-(e) of the 2008 General Election Law under which, as mentioned, candidates would win a DPR seat if they obtained at least 30% of the 'seat quota' (Article 214(a)).[33] To meet this quota, candidates needed specifically to be selected by voters – a vote for the candidate's party would not count towards it. If more candidates met this requirement than there were seats won by their party, seats were awarded to candidates placed highest on the party's candidate list (Article 214(b)). If, on the other hand, fewer candidates met the 30% quota than seats won by the party, or if no candidate met the threshold, then seats were allocated based on the relative positions of the candidates on the party list (Articles 214(d) and (e)).

The applicants pointed out that these provisions gave political parties almost unbridled discretion to choose which of their candidates would obtain a seat. Unless an individual candidate obtained 30% of the quota, parties could allocate seats to any of their candidates, regardless of how close those candidates came to meeting the quota. Indeed, parties could allocate seats to candidates who attracted far fewer votes than their other candidates, simply because the party had positioned them higher on the candidate list. The applicants

33 The applicants also objected to so-called 'affirmative action' aspects of the list system, which are discussed later in this Chapter.

argued that this was unjust and impeded their rights to be elected, thereby breaching Articles 22E (which requires that elections be free and fair) and 28D(1) (which prohibits discrimination and injustice).

The Court accepted that political parties play a significant role in the democratic process, particularly by putting forward candidates. However, parties could not 'breach the principle of people's sovereignty' established by Article 1(2) of the Constitution. For the majority, this was a fundamental and absolute principle.

> It is not merely a basic norm. It is more than that. It constitutes the morality of the Constitution for the entire life of the state and nation in politics, social affairs, economics and law. This principle must exist side by side with – and not undermine but rather uphold – human rights, the basis of human dignity.
>
> *Open List case*, 2008, p. 102

Because the people's sovereignty was so important, the rights of voters required 'respect and value' rather than susceptibility to the politicking involved in formulating party lists (*Open List case*, 2008, p. 103). The parties' task is to identify and nominate candidates who meet the prerequisites for holding office and will best serve the public interest – things which, according to the Court, the public at large might not be well-placed to assess (*Open List case*, 2008, p. 103). However '[t]he role of political parties in the recruitment of members of parliament stops when the parties choose their candidates' (*Open List case*, 2008, p. 103). After this, the choice should be left to citizens. Candidates must, therefore, be elected because of the number of votes they receive, not their position on the party list (*Open List case*, 2008, p. 105).

The Court held Articles 214(a)-(e) to be unconstitutional for contravening both the people's sovereignty (Article 1(2)) and 'justice' (Article 28D(1) of the Constitution). The people's sovereignty was breached because Article 214 allowed parties to install a candidate without regard for the number of votes he or she received (*Open List case*, 2008, p. 105). Similarly, Article 214 was 'unjust' because it employed 'double standards' (*Open List case*, 2008, p. 106): a candidate receiving few votes could defeat a candidate receiving many. The Court also accepted that Article 214 failed to provide equality, thereby violating Articles 27(1) and 28D(3), because it imposed different legal rules upon candidates in the same circumstances. To maintain the list system also ignored the political legitimacy obtained by the candidates receiving the most votes.

While this decision appears to rank amongst the better reasoned issued by the Court, it was problematic, not least for foiling attempts to increase the

proportion of females in parliament – an issue discussed later in this Chapter. It also caused significant uncertainty about how, with the invalidation of Article 214, *party votes* would be used in the seat allocation process. Two main alternatives were raised. One was that a vote for a party could be considered a vote for the candidates the party ranked most highly on its list. Alternatively, party votes could be counted only to determine the seat quota and how many seats the party receives, with seats then being allocated to the individual obtaining the most individual votes (Sherlock, 2009, p. 9).

In the event, the Electoral Commission (KPU) chose the second alternative. Sherlock (2009, p. 9) suggests that this choice probably better reflects the Constitutional Court's decision. However, on my reading, a vote for a party rather than an individual candidate probably indicates that the voter is happy for the party to allocate votes to its preferred candidates. If voters want a particular candidate they can simply vote for that candidate. A fairer approach might be to evenly distribute the party votes obtained in an electoral district amongst all party candidates within that district. This way, the preferences of voters for individual candidates and for the party generally would be maintained.

Despite these uncertainties and critiques, this decision's effects have been significant. As Sherlock (2009, p. 7) puts it, the Court's decision transformed a tentative move towards the semi-open-list system under the 2008 General Election Law into a 'leap towards a fully open list system'. And, despite various criticisms (Horowitz, 2013, p. 286), the decision appears to have enhanced democracy and accountability. Competition for seats between candidates of the same party appeared to increase; and the relative power of the central party executive, which had determined candidate positions on the list, often in return for bribes from candidates, decreased (Sherlock, 2009, p. 7). Some candidates were even said to have demanded the return of moneys because larger parties were no longer able to guarantee a seat to the highest bidder (Sherlock, 2009, p. 7). Better still, the decision prompted:

> [a] rush of aspiring candidates to their constituencies, so that they could curry favour with voters in ways candidates on a closed list did not find it necessary to do. Accountability to the electorate was undoubtedly enhanced by the decision.
>
> HOROWITZ, 2013, p. 185

6.2 *Affirmative Action*

Despite its positive effect on democratic practice, the *Open List case* (2008) has stymied efforts to increase female participation in political parties and, ultimately, in national and regional parliaments. As mentioned in Chapter 7, Article 55(2) of the 2008 General Election Law requires that at least one in

every three candidates on every party's candidate list be female. One of the applicants in the *Open List case* (2008), DPRD candidate Muhammad Sholeh, objected to Article 55(2), arguing that it discriminated against male candidates and was hence unconstitutional.

An eight-judge-to-one majority of the Court rejected this argument, upholding Article 55(2). According to the majority, the Indonesian parliament had enacted Article 55 to fulfil Indonesia's various international gender-related obligations, including those under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 28H(2) of the Constitution, too, gave every person the right to 'facilitation' or 'special measures' (*perlakuan khusus*) to ensure that they have the same opportunities and benefits as others to obtain equality and justice. Other countries had enacted similar provisions. Thus, even if affirmative action breached the constitutional rights of male candidates as alleged by the applicant, this would be permissible under Article 28J(2) of the Constitution (*Open List case*, 2008, pp. 98–99).

Conveying what can only be described as outdated views, the all-male majority also declared that the 30% quota struck an appropriate balance between increasing the chances of women being elected while:

> allowing the public to evaluate the acceptability of women entering the political fray, not just because they are women, but from the perspective of their capacity and capability as legislators and their place in Indonesian culture.
>
> *Open List case*, 2008, p. 98

Justice Maria Farida Indrati, the only female to have served on the Constitutional Court, issued a strong sole dissent. Though she agreed that Article 55(2) was constitutional, she pointed out a flaw in the majority opinion. On the one hand, the majority found Article 55(2) to be discriminatory but not unconstitutional because it justifiably provided for affirmative action in furtherance of Article 28H(2) of the Constitution and CEDAW. Yet Article 4 of CEDAW specifies that affirmative action is not discrimination.[34] As for Articles 214(a)–(e), Justice Indriati would have upheld them because affirmative action depended

34 To be fair, the majority's decision was perhaps more nuanced than Justice Indrati expressed. In an earlier part of its judgment, the majority appeared to have deliberately avoided declaring that affirmative action was discriminatory; but in its final holding, the Court said that 'even though it is viewed as reverse discrimination, it does not breach the Constitution'…(*Open list case*, 2008, para [4.1]). The majority also mentioned that even though affirmative action had been 'received' by Indonesia through CEDAW, it had to prioritise the Constitution over CEDAW (*Open list case*, 2008, para [3.16]).

on the open-list system. If candidates were ranked on the number of votes they obtained rather than their position on the party list, affirmative action would be a nullity (*Open List case*, 2008, p. 112).

6.2.1 *Affirmative Action Case* (2013)

Even though the Constitutional Court's decision in the *Open List case* (2008) made the requirement that women comprise 30% of party lists redundant, it was maintained, with some adjustments, in the 2012 General Election Law. In the *Affirmative Action case* (2013), thirty applicants, comprising mainly individuals, NGOs working on gender issues and some parliamentarians, challenged two provisions of the 2012 General Election Law. They argued that these provisions breached the 'affirmative action' right contained in Article 28H(2) of the Constitution.

The first provision was the Elucidation to Article 56(2) of the 2012 General Election Law. Article 56(2) itself requires that there be 'at least one female candidate for every three candidates on the candidate list'. The Elucidation stated that for every three candidates, 'the female candidate can be ranked as one, or two, or three and so on, not only number three, six and so on'. The purpose of the provision appeared to be to prevent parties from putting their female candidates at the bottom of the list. In particular, the applicants were concerned that the word 'or', used several times in the Elucidation, prevented more than one woman appearing amongst the first three candidates.

Presidential and parliamentary representatives emphasised during the case hearings that requiring 'at least' 30% of candidates to be female did not prevent *all* candidates being women. The presidential representative also pointed out that the position of candidates on the list was irrelevant given that seats were now allocated to candidates who obtained the most votes irrespective of their position on the list.

For the Court, these differing interpretations of Article 56(2) indicated that the provision violated the constitutional right to legal certainty, discussed in Chapter 6. The Court held that 'or' in the Elucidation needed to be replaced with 'and/or' to clarify that more than one female could be included amongst the first three candidates on a list. Accordingly, the Court held that the Elucidation to Article 56(2) was conditionally unconstitutional unless 'or' was interpreted to mean 'and/or'. However, the Court pointed out, as had the presidential representative, that since its decision in the *Open List case* (2008) the relative position of candidates on the list had become meaningless. While parties still needed to ensure that 30% of their candidates were women, there was no absolute requirement that women occupy 30% of the seats in parliament. Whether this occurred was for voters to decide.

The second provision the applicants challenged was Article 215(b) of the 2012 General Election Law, which stated that if two candidates obtained the same number of votes in a single electoral district, the person elected would be determined based on the spread of votes (*persebaran perolehan suara*) 'taking into account' female representation. The applicants argued that 'taking into account' breached Article 28H(2) because it allowed 'political considerations' to determine if women were selected. The Court held that, as a general matter, all citizens, whether male or female, had a right to become a member of a representative institution if the spread of votes they obtained exceeded those obtained by another candidate. Nevertheless, for the Court, Article 28H(2), and the special treatment it provided for women, required that the phrase 'taking into account female representation' be read to mean 'prioritising female representation', if both a man and a woman obtained the same spread of votes. The Court declared that Article 215(b) was conditionally unconstitutional unless given this meaning. It seems, then, that if both a female and a male candidate obtain the same number of votes and the same spread of votes, the female should be elected. Of course, the scope of this decision is narrow, because two candidates are unlikely to receive the same number of votes in an electoral district encompassing many thousands of voters.

6.3 *Removal from Parliament*

Another area of common constitutional dispute has been whether parties can 'recall' their members from parliament – even if citizens voted for those members as individuals – and replace them with other members. Both Article 12(b) of the 2002 Political Parties Law and Article 85(1)(c) of the 2003 Representative Institutions Law permitted this. These provisions stated that political party members who are also parliamentarians can be removed from parliament if their party membership is revoked for violating party rules and regulations.

6.3.1 *Djoko Edhi Soetjipto Abdurahman Case* (2006)

The constitutionality of this 'recall right' was first challenged in 2006 by Djoko Edhi Soetjipto Abdurahman, who served in the DPR as a member of the National Mandate Party (*Partai Amanat Nasional*, PAN). He had participated in an official study tour to Egypt to study gambling laws, without prior permission of the party. This, the PAN executive determined, violated internal party rules (Suwarjono, 2005).[35] Abdurahman was 'recalled' in late 2005 – that is, PAN

35 Djoko Edhi Soetjipto Abdurahman was later formally dismissed from parliament by the President, but an administrative court then found that his dismissal was invalid and ordered the president to revoke the dismissal order (Elistiawaty, 2007).

revoked his membership and, with it, his seat in parliament, using the provisions of the 2003 Representative Institutions and 2002 Political Parties Laws just mentioned.

By a narrow majority, the Court rejected his application. Mirroring comments made in the *Open List case* (2008) discussed above, the five-judge majority acknowledged that the Constitution – particularly Articles 6A(2), 8(3) and 22E(3) – gave political parties a central role in Indonesia's democratic system. Parties were an 'important part of Indonesia's political infrastructure, necessary in a democratic state' (*Djoko Edhi Soetjipto Abdurahman case*, 2006, p. 47), providing a critical forum within which citizens can exercise their democratic rights to express an opinion and to associate. Political parties also connected the people and the government, mobilised voters and recruited politicians. To perform their constitutional functions, however, parties needed to have:

> rights or powers to take action to uphold disciplinary standards of their members, so that their members comply with internal rules, policies and working programs outlined by the party… This is a logical consequence of a person becoming a member of an organisation, in this instance a political party. Upholding party discipline is critical to achieving the working programs of the party put forward by that party during the election campaign. In addition, party discipline is also critical for the development and stabilisation of party traditions.
>
> *Djoko Edhi Soetjipto Abdurahman case*, 2006, p. 48

If parties were unable to impose sanctions, members could, once elected, join another party or even establish their own party as a competitor without fear of losing their parliamentary seat. To justify leaving their original party, some parliamentarians had claimed that their primary concern was representing the people, not that political party, and that they should be able to leave a party that failed to meet the people's aspirations. The majority disagreed: a better view was that a party represented the aggregated interests of the people, which shaped that party's platform. People joined parties voluntarily; and by doing so they implicitly agreed to follow internal party rules, including to be punished for breaching them. A member who diverged from the party line could legitimately be removed from the party under the challenged provisions. Members who were unhappy with the decisions or processes of their parties could pursue their grievances through other judicial avenues, including the administrative courts.

The Court rejected the application on various grounds, four of which I discuss here. The first concerned Article 22E(1) of the Constitution, which requires

that elections be held every five years. The applicant argued that Article 22E(1) precluded members being replaced other than through these elections. The Court disagreed, pointing to Article 22B of the Constitution, which authorises parliamentarians being removed from office in accordance with statutory procedures.[36]

Second, the applicants argued that recall violated Article 28D(1) of the Constitution, which guaranteed legal certainty and protection. The Court's response was that Article 28D(1) was not intended constitutionally to prohibit a person from being removed from office in all circumstances. For the Court, 'legal certainty' meant 'legal certainty which is just and equal treatment before the law' (*Djoko Edhi Soetjipto Abdurahman case*, 2006, p. 52). The impugned provisions were not discriminatory because they applied to all members of parliament, not just the applicant. As the Court said:

> The reality is that the applicant has merely had these rules applied against him by the party that nominated him. This is not a constitutional issue but rather the application of the impugned provisions. If the applicant is unhappy with being recalled, the applicant can take the party to another court. The Constitutional Court does not deal with the application of rules, just the rules themselves.[37]
>
> *Djoko Edhi Soetjipto Abdurahman case*, 2006, pp. 52–53

Third, the Court dismissed the applicant's arguments based on Article 28D(2) of the Constitution, which provides the 'right to work' and to 'just recompense and treatment in workplace relations'. For the Court, Article 28D(2) concerned economic rights; it did not apply to this case, where the applicant was claiming violation of civil and political rights. In any event, membership of the national parliament was not 'work' within the meaning of Article 28D(2). Rather than being in an ordinary employer-employee relationship, the applicant was performing a 'constitutional function in a state institution' (*Djoko Edhi Soetjipto Abdurahman case*, 2006, p. 53).

Finally, the applicant, along with some expert witnesses, argued that recall rights were anti-democratic and totalitarian. The Court rejected this also, pointing out that Indonesia was both a democracy (Article 1(2) of the Constitution)

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36 The Court also pointed out that Articles 7B and 7C of the Constitution outline various circumstances in which the president and/or the vice president can be removed from office before the their term expires.

37 As mentioned in Chapter 5, however, the Court has, in fact, examined the constitutionality of the application of statutes, albeit rarely.

and a law state (Article 1(3)), and that the recall right did not undermine democracy.

> Just because parties have a recall mechanism at their disposal does not mean that the mechanism is undemocratic. Indeed it is necessary because members of parliament, as the people's representatives, need to be held accountable so that the people can control them, through political parties. It is logical that this function is performed by political parties in a political system that employs political parties.
>
> *Djoko Edhi Soetjipto Abdurahman case*, 2006, p. 55

Four Constitutional Court judges issued dissents. Justice Fadjar, in an individual dissenting judgment, emphasised that the Constitution placed sovereignty in the hands of the people. Yet recall gave political parties too much control over the parliament, which should represent the people. Indeed, the right was usually exercised for political reasons, not to further the people's sovereignty (*Djoko Edhi Soetjipto Abdurahman case*, 2006, pp. 64–65). In his view, if members were to be recalled at all, they should be recalled by the national parliament itself, rather than by their nominating parties, and even then only for established reasons, such as a breach of the parliamentary code of ethics. Justice Fadjar was also concerned that members recalled for a perceived breach of party rules were afforded no due process, rendering such dismissals subjective. Finally, he observed that recall was usually found in parliamentary systems but not presidential systems, like Indonesia's.

Justices Siahaan and Asshiddiqie issued a joint dissent, reaching a similar conclusion to Justice Fadjar, but employing altogether different reasons. For them, when elected, parliamentarians became subject to a legal obligation to perform the functions entrusted to them by the people who voted for them. This relationship between voters and their representatives was public and separate from the 'private' relationship between representatives and the parties that nominated them. Even if a party member breached party discipline or rules, the public relationship between citizens and the representative they elected remained intact. Yet the impugned provisions allowed this private legal relationship (between a political party and its elected members) to displace the public law relationship (between voters and those they elected). This public relationship was of a higher order than the private, being 'based on constitutional authority' (*Djoko Edhi Soetjipto Abdurahman case*, 2006, p. 68). Justices Siahaan and Asshiddiqie also appeared concerned that, if this private relationship trumped the public, temporary or political interests might ultimately prevail. In other words, the threat of recall could render party members more

responsive to interests of the party elite than those of the people. A political party could, therefore, remove someone from the party, but not from parliament. Removal from parliament was the DPR's prerogative. Nevertheless, due process was required for removal from either the party or the parliament. For Siahaan and Asshiddiqie, the impugned provisions did not provide these safeguards and therefore were unconstitutional.

In his sole dissent, Justice Marzuki held that recall violated various constitutional provisions, including Articles 28D(1) and (2), because recalled members lost recognition, guarantees, protection and legal certainty and equal treatment in performing their constitutional tasks as members. The impugned provisions also breached the right to 'struggle collectively' (Article 28C(2)).

6.3.2 *Lily Wahid Case* (2010)

Party recall powers were maintained in new Political Parties and Representative Institutions Laws enacted in 2008 and 2009 respectively. Articles 213(2)(e) and (h) of the 2009 Representative Institutions Law allowed DPR members to be removed from parliament before their term expired if their political party either relinquished their party membership or proposed their removal from parliament. Similarly, Articles 12(g) and (h) of the 2008 Political Parties Law allowed political parties to replace or remove their national or regional parliamentarians.

Lily Chadidjah Wahid, younger sister of former Indonesian President Abdurahman Wahid, challenged these provisions in the *Lily Wahid case* (2010). She and fellow legislator Effendi Choirie had been dismissed by her nephew Muhaimin Iskandar, then Chairperson of the National Awakening Party (*Partai Kebangkitan Bangsa* (PKB)) and Manpower and Transmigration Minister, for supporting a parliamentary inquiry into corruption in the tax office in February 2011 (Sijabat 2011).

Like Djoko Edhi Soetjipto Abdurahman several years earlier, Lily Wahid argued that party recall powers violated Article 1(2) of the Constitution ('Sovereignty is in the hands of the people') because they allowed political parties to remove members who had been duly elected. She also argued that they breached Article 28G(1), which provides the rights to honour, respect, a feeling of safety, and protection from fear to exercise one's human rights.

The Court began by pointing to the *Djoko Edhi Soetjipto Abdurahman case* (2006). As in that case, the Court observed that the constitutional amendments had strengthened the party system – including by empowering parties to discipline their members for breaching party platforms and rules – and that Article 22 of the Constitution itself specifically provided for the dismissal of parliamentarians. The Court recognised that the recall power could lead to community

aspirations being stifled, but found that parties needed to be able to protect themselves, and the national parliament, from members who breached the law or ethics. Without such protections, a member could cause significant reputational damage to his or her party and the entire parliament. Again, the Court emphasised that by joining political parties, members implicitly bind themselves to party rules and disciplinary procedures. An aggrieved recalled member could always challenge their removal in the administrative courts.

Even though it added nothing to the Court's jurisprudence on recall rights, the *Lily Wahid case* (2010) is notable for being a unanimous decision. While the precise 'weight' of a unanimous decision compared with a split decision is unclear,[38] any disagreement amongst justices evident in the *Djoko Edhi Soetjipto Abdurahman case* (2006) appears to have dissipated.

6.4 *Other Types of Removal*

However, parliamentarians need not always vacate their seats when they are no longer supported by their parties. The Court has, in some circumstances, allowed representatives to continue serving in parliament, even though they are no longer members of the political party that nominated them. In the *North Labuhanbatu and Deli Serdang DPRD case* (2013), for example, 11 DPRD members representing smaller parties from North Labuhanbatu and Deli Serdang challenged the 2008 Political Parties Law, as amended in 2011. They had been elected in their respective districts for a 2009–2014 legislative term but faced removal under Article 16(3) of the Law, which provided that if:

> a member removed from a party is also a member of parliament, the removal from membership of the political party is to be followed by removal of parliamentary membership in accordance with the law.

Unlike the applicants in the recall cases, who were removed from their parties for allegedly violating internal party rules, these applicants claimed that they had been forced to switch parties. This was because their parties no longer met the requirements to participate in the 2014 elections. These applicants argued that Article 16(3) breached Articles 28D(1) and (3) of the Constitution if applied to remove them from parliament in these circumstances.

The Court observed that the Constitution does not prohibit citizens from joining another political party – or even from holding membership in more than one party. Constitutionally, then, a person need not drop membership of one party to join another. Nevertheless, a party member must follow party

38 On this see Chapter 3.

discipline and internal party rules, which usually prohibit members from joining another party.

The Court held that if applicants were forced to join another political party in the same or similar circumstances to those facing the applicants, they should not lose their seats. If they did, then the rights of citizens to elect their representatives would be ignored. Normally, if a party recalled a member, any vacancy would usually be temporary because the party could replace that member with another on its fixed candidate list. However, parties could not always fill these vacancies; for example, the party might have no candidates remaining on its fixed candidate list. Yet, for the Court, having empty seats in national or regional parliaments was highly undesirable, because it could significantly impede that parliament in performing its tasks.

Ultimately, the Court decided that Article 16(3) was invalid unless:

> given the meaning not to apply to members of the national or regional parliament:
> a. whose nominating parties are no longer contesting elections or whose party administration no longer exists;
> b. who are not removed or withdrawn from their original nominating party; or
> c. if no replacement candidates remain on the fixed candidate list of the nominating party.
>
> *North Labuhanbatu and Deli Serdang DPRD case*, 2013, pp. 49–50

As to whether a serving member who switches parties also loses membership of parliament, the Court said:

> the party that nominated the candidate has a constitutional right to remove that candidate from parliament if that candidate is no longer a member of the political party. However, if the party does not withdraw party membership, even if the candidate has moved to another party, the candidate will not necessarily be automatically removed from Parliament. [This] depends on the circumstances, but the main [questions become] why the political party did not withdraw the membership…and why the member switched political parties.
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> *North Labuhanbatu and Deli Serdang DPRD case*, 2013, pp. 47–48

6.5 *Suspensions*

The *Natakusumah case* (2009) was a challenge to Article 219 of the 2009 Representative Institutions Law, which authorised the suspension of DPR

members if prosecuted for a crime which carries a maximum penalty of five years or more, or which was a 'special crime'.[39] The applicant, Achmad Dimyati Natakusumah, was a DPR member whom prosecutors had named as a suspect in a corruption case. This was both a crime for which at least five years' imprisonment could be applied and a 'special crime'.

The applicant argued that the DPR could only regulate dismissals under Article 22B of the Constitution, not suspend its members. The Court disagreed, holding that Article 22B empowered the DPR to regulate dismissal mechanisms and processes, including temporary suspensions. The Court also opined that suspension would be beneficial for both the member and parliament. Free of parliamentary duties, suspended members could better defend themselves. The DPR, too, could avoid reputational damage from one of its members continuing to work while facing trial.

39 Special crimes (*tindak pidana khusus*) are crimes regulated outside the Criminal Code, by separate legislation. They include corruption, money-laundering and terrorism.

CHAPTER 9

Presidential Elections

The Constitutional Court has heard several challenges to the 2008 Presidential Election Law and its predecessor of 2003. Perhaps most disputed has been the requirement that candidate pairs be proposed by political parties, or coalitions of political parties, holding at least 20% of seats in the DPR or obtaining at least 25% of national votes in the preceding DPR elections – the so-called '20/25% threshold'. As we shall see, some applicants have also argued that candidates should be able to nominate themselves with no support from political parties. Other candidacy requirements have also been challenged, including that presidents be physically and mentally healthy and prove that they have paid tax by submitting their tax returns.

As we shall see, while the Court has rejected these candidacy-related challenges, it has upheld others. For example, it has decided that the 2008 Presidential Election Law's requirement that presidential and legislative elections be held separately is unconstitutional. It has also held that preventing citizens not listed on the electoral roll from voting on polling day is unconstitutional. Unregistered voters must be permitted to vote if they meet particular requirements specified by the Court.

As outlined in Chapter 7, to win a presidential election, a pair of presidential and vice-presidential candidates must obtain at least 50% of votes overall and at least 20% of votes in half of Indonesia's provinces (Article 6A(3) of the Constitution). If no pair meets this threshold, then another election is held between the two pairs obtaining the most votes. The pair with the most votes in that second-round poll wins (Article 6A(4)). These provisions have given rise to two challenges. In one, the Court determined whether a two-round process is necessary if only two candidate pairs contest the election. In the other, the Court considered whether the Article 6A(3) thresholds were 'fair'. I begin this Chapter with these two cases.

1 Judicial Review of the Presidential Electoral System

The 2014 presidential election was contested by only two candidate pairs: Prabowo-Rajasa and Jokowi-Kalla. One question that arose in the lead-up to that election was whether a second-round election would be necessary in the unlikely event of one pair obtaining more than 50% of the overall vote but not

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also over 20% in half of Indonesia's provinces, as required by Article 6A(3) of the Constitution. Could a two-pair election be treated as a 'run-off' election, where the party obtaining the most votes won, regardless of how many votes they obtained across Indonesia's provinces? Or was a second round required, with the risk that, in a close race, one pair might win the first round and another win the second, thereby creating doubt over the legitimacy of the elections?

In the month before the 2014 presidential election, Indonesia's General Electoral Commission (KPU) announced that it was anticipating the possibility of two rounds (Jong, 2014) and was considering asking the Constitutional Court for clarification. Before it could do so, several NGOs and individuals challenged the constitutionality of Article 159(1) of the 2008 Presidential Election Law, which closely follows Article 6A(3) of the Constitution.

1.1 Two-candidate Presidential Election Case (*2014*)

The Court issued a six-judge-to-two majority decision, holding that Article 159(1) of the 2008 Presidential Election Law was unconstitutional unless 'given the meaning' to be inapplicable to two-pair elections. In such elections, the pair with the most votes won, regardless of the provinces from which those votes came. In other words, first-round two-pair elections would be treated as if they were second-round run-off elections.

For the majority, Article 6A(3) indicated that the Constitution's drafters sought 'dual legitimacy' for elected presidents and vice-presidents. Not only did they need support from at least half of voters, they also needed 'representative support' – that is, support across most of Indonesia (*Two-candidate Presidential Election case*, 2014, p. 34). The majority appeared to favour this dual legitimacy as a matter of policy, because it was 'inclusive', protected the integrity of Indonesia, and prevented presidential candidates from campaigning only in more populated provinces (*Two-candidate Presidential Election case*, 2014, para [3.18]). However, the majority found that, because presidential candidates were nominated by coalitions of national parties, which represented the population across all regions of Indonesia, those candidates would already be 'representative'. In other words, the nomination requirements meant that the need for a 'president representing all the community and regions in Indonesia had already been fulfilled' (*Two-candidate Presidential Election case*, 2014, para [3.20]).

Two judges – Patrialis Akbar and Wahiduddin Adams – issued separate dissents. The nub of both decisions was that the provincial representation requirement in Article 6A(3) of the Constitution could not be ignored. Justice Akbar emphasised that Article 6A(3) had been included to prevent candidates

representing dominant groups in more densely-populated parts of Indonesia from occupying the presidency. Further, invalidating Article 159(1) was not constitutionally possible: it was a 'direct descendant' of Article 6A(3) because the provisions contained almost identical wording. For Justice Adams, holding a single simple-majority presidential election violated Article 6A, which 'did not philosophically adhere' to such elections, even those contested by only two candidate pairs. He was also concerned that if Article 6A(3) were ignored, candidates would only focus on the 'big' provinces.

The majority and minority decisions are not desirable legal or pragmatic solutions to the problem the Court faced in this case. In particular, the majority decision is constitutionally questionable. In essence, the majority substituted the presidential nomination threshold, discussed later in this Chapter, for the provincial representation threshold. But these thresholds are directed towards very different ends – one to ensure the president and vice-president elect have support across most of Indonesia, and the other to encourage parliamentary coalition-forming and a workable relationship between the executive and the legislature. However, parties that nominate a particular pair of candidates will not necessarily enjoy widespread support across half of Indonesia's provinces, as the majority presumed, despite the party verification requirements discussed in Chapter 7. To obtain parliamentary seats, parties need 3.5% of the national vote, but the 'spread' of votes obtained need not be widespread. A party could, for example, meet this threshold from votes obtained solely in Java. Ultimately, though, the Court did not explain why drafters of the Constitution included the provincial representation requirement if the nomination requirements sufficed.

Critically, too, the majority did not specify which provision of the Constitution was violated by Article 159(1) of the 2008 Presidential Election Law. This would have been difficult because Article 159(1) and Article 6A(3) of the Constitution are of identical import. On one view, declaring Article 159(1) conditionally constitutional was tantamount to the Court doing the same to Article 6A(2) itself. If this is true, then the Court may have, in effect, amended the Constitution, overstepping its mandate in constitutional review cases: to review statutes as against the Constitution. Even by the Court's standards of activism – exemplified in its conditional constitutionality cases discussed in Chapter 6 – this is quite extraordinary.

The minority decisions were legally stronger than the majority, but they suffered from a serious practical inadequacy: in a future election, Indonesians might be forced to vote twice for precisely the same candidates. This would be absurd, and would achieve little, except to cause confusion and undermine the credibility of the electoral system (Butt, 2014c).

A more elegant solution could have been achieved by construing Article 6A(4) of the Constitution differently. Article 6A(4) states:

> If there is no candidate pair elected [in the first round], the two candidate pairs obtaining the first and second most votes in the election are chosen by the people directly and the pair obtaining the most votes is inaugurated.

Article 6A(4) is somewhat ambiguous. It certainly could be interpreted to require a second-round run-off election. Indonesian lawmakers chose this interpretation by enacting Article 159(2) of the 2008 Presidential Election Law, which says:

> If no candidate pair is elected [in the first round]…the two candidate pairs obtaining the first and second most votes in the election are *chosen again* (*dipilih kembali*) by the people directly…[my emphasis].

In my view, the Court could have held that because Article 6A(4) of the Constitution does not use the word 'again', it should therefore be removed from Article 159(2), at least for elections contested by only two pairs. Article 6A(4) could then have been interpreted to mean simply that if one party does not meet the threshold in Article 6A(3), the number of votes obtained by the top two parties are compared, and the one with the most wins.

1.2 Ethnic Minorities Case (*2012*)

The *Ethnic Minorities case* (2012) was brought by five applicants, all of whom were heads of ethnic groups in the county of Tambrauw, West Papua. Like the applicants in the *Two-candidate Presidential Election case* (2014), they challenged Article 159(1) of the 2008 Presidential Election Law, which, as mentioned, requires candidates to obtain at least 50% of the national vote and 20% of the vote in at least half of Indonesia's provinces to win in a first round.

However, the applicants in this case employed different arguments, contending that candidates from ethnic minority groups had little chance of nomination for presidential elections, let alone winning them. The 'one man one vote' method of democracy helped ethnic majorities like the Javanese, but discriminated against candidates representing ethnic minorities. This harmed not only the applicants, but Indonesia as a whole, which was deprived of quality candidates from smaller ethnic groups. The applicants also appealed to Article 28H(2) of the Constitution, which states that 'Every person is to obtain facilitation and special treatment to obtain the same opportunities and

benefits in order to obtain equality and justice'. To this end, the applicants presented a formula for making the presidential election process more equitable for minorities.

The Court rejected their arguments, emphasising that Article 159(1) of the Law was virtually the same as Article 6A(3) of the Constitution. There was therefore no inconsistency between them. The Court also disagreed with the applicants about Article 28H(2), finding that ethnic origin or differences did not justify special treatment for presidential nomination. This was because:

> in principle, a democratic system must have no discrimination based on ethnicity, religion, race and class. A democratic electoral mechanism is directed towards giving the widest possible opportunity to all Indonesian citizens to participate in government. To be chosen as a candidate…a person must meet the requirements of Article 6(1) of the Constitution and Article 5 of [the 2008 Presidential Election Law]. These provisions neither impede nor provide special treatment to presidential candidates of a particular ethnic, religious, racial or class group.
>
> *Ethnic Minorities case*, 2012, p. 50

1.3 Electoral Roll Case (*2009*)

The *Electoral Roll case* (2009) ranks amongst the Court's landmark decisions in election-related cases. The applicants – noted constitutional lawyer and former Constitutional Court employee Refly Harun, and Maheswara Prabandon – challenged Articles 28 and 111(1) of the 2008 Presidential Election Law under which the 2009 presidential elections were to be held two months later. (They lodged their application in late June 2009, the Court issued its decision in July, and the presidential elections were held in August.)

Under Articles 28 and 111(1), to vote in the election, citizens needed to register beforehand with the Electoral Commission (*Komisi Pemilihan Umum*, KPU) so that their name appeared on the Electoral Roll (*Daftar Pemilih Tepat*) or the Supplementary Electoral Roll (*Daftar Pemilih Tambahan*). The applicants had not done this and faced being unable to vote. They argued that Articles 28 and 111 thereby restricted their right to vote, which was granted by Articles 27(1), 28D(1) and 28D(3) of the Constitution, and Indonesia's international legal obligations.

The Court began by referring to the *PKI case* (2003), where it had considered the rights to vote, stand and participate in government through freely elected representatives. These rights were provided by Articles 27(1), 28C(2), 28D(1), 28D(3) and 28I(2) of the Constitution; by Article 21 of the Universal Declaration of Human Rights and Article 25 of the ICCPR, which Indonesia ratified by Law

12 of 2005; and by Article 43 of Indonesia's 1999 Human Rights Law. According to the Court, these were fundamental rights that could not be limited or diverged from, including by imposing rules or procedures that made exercising them more difficult (*Electoral Roll case*, 2009, para [3.18]). Applied to the present case, the right to vote could not be restricted or impeded by the need for registration on the electoral roll. For the Court, this 'mere administrative procedure' could not nullify the substantive right to vote.

In the event, the Court held that Articles 28 and 111 were conditionally constitutional – that is, constitutional provided that they did not prevent unregistered citizens from voting. However, with only one month until the 2009 Presidential Elections, the Court was concerned that the government and KPU would not have time to issue regulations to give effect to its holding. The Court therefore issued what it described as a 'self-executing' decision, comprising a direct order to the KPU to employ the conditions as 'a guide' for the imminent presidential elections. This was the 'safest alternative' that would allow unregistered citizens to vote.[1]

The Court issued the following conditions:

1. Citizens not registered on the electoral roll can use their right to vote by showing a valid identity card (*Kartu Tanda Penduduk*) or passport (if voting overseas).
2. Citizens who use an identity card must also produce a Family Card (*Kartu Keluarga*) or equivalent.
3. Citizens who use an identity card can only use it at the polling station in the neighbourhood referred to on the card. Those using a passport to vote overseas must obtain approval and notification of the place of voting from the Foreign Electoral Committee (*Panitia Pemilihan Luar Negeri*).
4. Before voting by using an identity card or passport, voters must report to their local polling station.
5. Citizens must exercise their rights in the final hour prior to the close of polling at their local or internationally-approved polling station. Although the Court did not specify the reason for this condition, it seemed concerned to prevent citizens voting more than once, and presumed that travelling between polling stations in less than one hour to vote again would be difficult or impossible.

1 This type of decision, the Court declared, was consistent with its power and obligation, under Article 28(1) of the 2004 Judicial Power Law, to dig, follow and understand legal values and the sense of justice alive in the community.

The Court has applied this decision in subsequent cases to other types of elections. For example, the Court has held that unregistered voters can 'turn up' to vote in Pemilukada elections, provided they produced their identity cards (*Pemilukada KTP case*, 2012).

2 Judicial Review of Candidacy

Article 6 of the Constitution specifies the prerequisites for standing for presidential and vice-presidential office. Candidates must: be an Indonesian citizen from birth; have never, by choice, held citizenship of another country; have never committed treason; and be physically and mentally able to perform the functions and obligations of office (Article 6). To this can be added another 'requirement' found in Article 7: a president or vice-president cannot serve more than two terms. Once appointed, the president and vice-president serve a five-year term, 'after which they can be re-elected to the same office for only one term'.

Article 6(1) of the Constitution specifies that further prerequisites to hold presidential office are to be regulated by statute. Set out in Article 5 of the 2008 Presidential Election Law,[2] these are:

(a) Having devotion to Almighty God;
(b) Holding Indonesian citizenship since birth and never having, by choice, held citizenship of another country;
(c) Never having committed treason, corruption or another serious crime;
(d) Being spiritually and physically capable of performing the duties and responsibilities of president or vice-president;
(e) Being domiciled within the Unitary Republic of Indonesia;
(f) Having reported one's assets to the government agency authorised to examine asset reports of state officials;
(g) Not being responsible for a debt that could damage the finances of the state;
(h) Not being a declared bankrupt based on a judicial decision;

2 Prior to the enactment of the 2008 Election Law, the requirements were contained in Article 6 of the 2003 Presidential Election Law. These requirements were identical to the 2008 Law's, with several exceptions. In particular, the 2003 statute contained four requirements not retained in the 2008 version: having a curriculum vitae, not having had one's right to vote revoked by judicial order or having been convicted for mutiny; and having at least a senior high school education.

(i) Never having performed a reprehensible act;
(j) Being a registered voter;
(k) Having a tax file number and meeting obligations to pay tax for the previous five years, as evidenced by an official Tax Return;
(l) Not previously having held office as president or vice-president for two terms;
(m) Being loyal to *Pancasila* as the basis of state; to the 1945 Constitution; and to the ideals of the Proclamation of 17 August 1945;
(n) Never having been convicted of a crime for which the penalty is five years' imprisonment or more;
(o) Being at least 35 years of age;
(p) Having at least senior high school, Islamic senior high school, vocational high school, Islamic vocational high school or equivalent education;
(q) Not being a member of the Indonesian Communist Party, or its mass organisation, or having been directly involved in the 1965 coup;[3] and
(r) Having a vision, mission and program to carry out the administration of the Republic of Indonesia.

2.1 *Party Nomination*

Since the Court's establishment, dozens of applicants with presidential aspirations but no or insufficient party support have challenged the constitutionality of electoral laws requiring that presidential candidates be nominated by a party or coalition.

The Court dismissed the first of these cases, lodged in 2004, for lack of standing, primarily because applicants could not prove that the nomination requirements caused them constitutional damage. Nevertheless, in these early cases applicants made arguments that the Court would later assess on their merits. For example, in the first – the *Fathul Hadie case* (2004) – the applicants, most of whom were lecturers and NGO activists, argued that provisions of the 2003 Presidential Election Law that imposed the nomination requirement were incompatible with Article 6(1) of the Constitution, which establishes the prerequisites for holding presidential office, but does not require nomination by a political party.[4] They argued that Article 6A(2) of the Constitution was strictly

3 However, as discussed in Chapter 8, the Constitutional Court has, in the *PKI case* (2003), already invalidated an equivalent provision in the 2003 General Election Law. It is probable that, presented with a challenge to Article 5(q) of the 2008 Presidential Election Law, the Court would invalidate it on similar grounds.

4 Specifically, the applicants challenged Articles 4, 5(3), 5(4), 101(1), 1(5), 26(3) and 67(1).

procedural and could not, therefore, impose party nomination as a candidacy prerequisite. They also argued that the need for parliamentary nomination, and the threshold of support required, violated citizens' rights to be 'assisted, have equal opportunity, and be treated fairly without discrimination' (*Fathul Hadie case*, 2004, p. 9). However, because the applicants were voters, not candidates, they could not demonstrate that they had suffered any constitutional damage and were denied standing.

In subsequent early cases, the Court refused standing but gave different reasons: applicants could not challenge the constitutionality of the nomination process established in the Presidential Election Laws because Article 6A(2) of the Constitution itself required nomination by political parties.[5] A statutory provision that reiterates or restates a constitutional provision does not damage any constitutional rights. In the earlier *Agus Abdul Djalil case* (2004), the Court held that, even though all citizens have a constitutional right to become president if they meet the prerequisites in Articles 6(1) and 6(2) of the Constitution, only political parties were constitutionally entitled to put forward presidential candidates. Citizens seeking presidential office who do not secure nomination suffer no damage because they have no constitutional right to nominate themselves.

Because the Court denied standing in these cases, it did not fully address these and other substantive constitutional arguments the applicants made. One of these was that the nomination requirement discriminated against those who wished to stand for president but lacked party support. Another was that citizens have a constitutional right to stand for public office, including the presidency and vice-presidency, and the nomination requirement prevents them from exercising it.[6] However, the Court considered these arguments in subsequent cases, to which I now turn.

2.2 Independent Candidates Case (*2008*)

In the *Independent Candidates case* (2008) the Court granted standing to the applicants. (Notably, the Court did not attempt to justify doing so, given its previous refusals just mentioned.) The case was brought by several citizens who appeared not to identify with or support any existing political party. One of them, Fadjroel Rachman, wanted to exercise the right to participate in government by becoming a presidential candidate despite not being nominated by a party. Other applicants did not want, when electing a candidate pair, to be

5 See, for example, *Agus Abdul Djalil* (2004); *Yislam Alwini* (2004); and *Mulyo Wibisono* (2004) cases.

6 See *Agus Abdul Djalil* (2004); *Yislam Alwini* (2004); *Mulyo Wibisono* (2004) cases.

bound by the candidates chosen by a party or coalition: they wanted the right to elect a president they trusted.

The applicants challenged Articles 1(4), 8, 9 and 13(1) of the 2008 Presidential Election Law. Together, these provisions imposed the political party nomination requirement and set the 20/25% threshold. The applicants' main constitutional hurdle was convincing the Court that Article 6A(2) of the Constitution should not be given its plain textual meaning, but rather should be read alongside the political rights contained in Chapter XA of the Constitution, including in Articles 27(1), 28C(2) and 28D(3). These provide the rights to vote and stand, to the 'same opportunity in government', 'collectively struggle for rights and to develop the nation', to be free from discrimination, and the like. As mentioned, Article 6A(2) states that candidate pairs 'are to be proposed by political parties or coalitions'. The applicants contended that Article 6A(2) was not cast in mandatory terms – it did not contain the words 'must' or 'needs' – so that an individual 'could' stand for president without being nominated by a party or coalition. This would also enable them to fulfil their Chapter XA rights.

A majority rejected this argument, giving three primary reasons. First, the 'original intent' of drafters was that party nomination be mandatory, pointing to transcripts of constitutional amendment debates in the MPR.[7] Second, the right to vote should be distinguished from the right to stand. The Constitution gave citizens voting rights in various provisions of Chapter XA, themselves derived from Article 1(2) of the Constitution, which places sovereignty in the hands of the people. As held in the *Electoral Roll case* (2009), discussed earlier in this Chapter, the right to vote was fundamental.[8] By contrast, the right to *stand* was subject to Article 6A(2), because Article 1(2) requires that the people's sovereignty be exercised 'in accordance with the Constitution' (*Independent Candidates case*, 2009, para [3.17]).[9] (In any event, the requirement for nomination by a political party did not prevent aspiring candidates from being nominated – they could establish their own party to nominate themselves (*Independent Candidates case*, 2009, para [3.15]).) Third, the Law was not discriminatory because a candidate could be nominated by a party without being a member of that party.

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7 The majority referred to constitutional debates in the MPR in very vague terms, only later in its judgment pointing to the Court's own compilation of these debates (Mahkamah Konstitusi, 2010a, pp. 165–360).

8 Although the majority did not cite the *Electoral Roll case* (2009).

9 The majority pointed to several previous decisions in which it had held this, including the *Agus Abdul Djalil* (2004); *Yislam Alwini* (2004); and *Mulyo Wibisono* (2004) cases.

The applicants made additional non-constitutional points to support their argument for independent presidential candidates. For example, they referred to various surveys performed in 2007 and 2008 by the Indonesian Survey Institute, which indicated that most Indonesians favoured independent candidates. They also pointed to independent candidates in other countries, including the United States. But the majority rejected both arguments, holding that surveys could not displace the clear words of Article 6A(2) and that foreign practices were not applicable in Indonesia.

Three judges issued separate dissents, between them upholding various arguments made by the applicants and drawing on arguments made by applicants in previous cases. However, no dissenter would have allowed independent candidates to stand until the 2014 elections, primarily because the KPU had already begun preparing for the 2009 election using the 2008 Presidential Election Law.

In his dissent, Justice Abdul Mukthie Fadjar decided that independent presidential candidates should be permitted. He would have held the impugned provisions either conditionally constitutional to the extent that they allowed independent presidential candidates, or conditionally unconstitutional to the extent that they did not. Justice Fadjar accepted that Article 6A(2) appeared to preclude independent candidates, but noted that 'living aspirations needed to be channelled, with or without amendments to the Constitution, particularly Article 6A(2)' (*Independent Candidates case*, 2009, p. 129). The Constitution entitled citizens to stand for public office, including the presidency and vice-presidency, and to participate in government. Impeding citizens enjoying these entitlements, including by imposing the nomination requirement, was constitutionally prohibited even though this requirement was established in Article 6A(2) of the Constitution itself. For Justice Fadjar, Article 6(1) set out the constitutional prerequisites for holding office as president or vice-president; and Article 6(2) gave parliament power to establish other prerequisites by statute, as it had done by enacting the 2008 Presidential Election Law. Neither Article 6(1) of the Constitution nor the prerequisites established by statute under Article 6(2) specified that candidates must 'come from' a party. By contrast, Justice Fadjar argued, Article 6A(2) did not establish prerequisites for holding presidential or vice-presidential office, but rather concerned procedures for nominating candidates. The impugned provisions had misinterpreted Article 6A(2) as a precondition for candidacy. Being merely procedural, Article 6A(2) could not be used to preclude the nomination of independent candidates. It merely identified parties as 'vehicles' or 'departure points' for candidates rather than necessities for taking office.

Like the majority, Justice Fadjar resorted to original intent to support his decision. However, the debates to which he pointed led him to the opposite conclusion. Justice Fadjar preferred the view of the MPR's Constitutional Commission, which had recommended Article 6A(2) be removed to allow independent candidates, to make Indonesia's democracy more participatory.[10]

In his dissent, Justice Maruarar Siahaan agreed that Article 6A(2) provided no scope for candidates to stand for presidential or vice-presidential office without support from a political party. Textually, there was no contradiction between Article 6A(2) of the Constitution and Article 8 of the 2008 Presidential Election Law – both stated that candidates 'are to be proposed by a political party or coalition'. However, Justice Siahaan found that this textual interpretation 'clearly ignored the doctrine of the unity of the Constitution' (*Independent Candidates case*, 2009, p. 134). For him, the Court was responsible for ensuring this 'unity' when interpreting the Constitution because the constitutional amendments had been made over four years. Although he did not say so directly, Justice Siahaan appeared concerned that the four amendments made from 1999 to 2002 left the Constitution with internal inconsistencies.

It was necessary, then, to view Article 6A(2) in the context of other amendments, rather than in isolation. Article 6A(2) needed to be read alongside Article 1(2) and the Chapter XV rights to participate in government, to equality, to push collectively for rights, and to develop the state. For him:

> Constitutional democratic states guarantee every citizen the same opportunity to determine the direction of government policy in order to realise the objectives of the state, with the right to vote and to stand for public office such as the presidency and vice-presidency.
>
> *Independent Candidates case*, 2009, p. 134

In this context, to require political party nomination disregarded the right of citizens to participate in government and:

> could not be justified because it does not meet the proportionality principle, which requires balance between objectives and fundamental rights protected and guaranteed in the Constitution.
>
> *Independent Candidates case*, 2009, p. 137

Even if, following the majority view, Article 6A(2) provided rights to political parties only:

10 Citing MPR (2004, p. 126).

> these rights would be derivative of the fundamental right of citizens to participate in government, organised through parties and a materialisation of the rights to associate, to express an opinion and to advance oneself through collective struggle to develop the community, nation and state.
>
> *Independent Candidates case*, 2009, p. 135

Finally, Justice Siahaan pointed out that the Court had already held, in the *Independent Pemilukada Candidates case* (2007), that heads of local executive governments could stand as independent candidates. For him, there was no compelling reason for differentiating between heads of regional executives and the head of the national executive (*Independent Candidates case*, 2009, p. 135). Justice Siahaan decided that the Court should have held the provisions under review unconstitutional to the extent that they failed to allow independent candidates to stand.

Justice Akil Mochtar issued a relatively short opinion in which he made similar comments to his dissenting brethren.[11] Like Justice Siahaan, he observed that the Constitution had been amended several times to address various issues, leading to 'differences between provisions' (*Independent Candidates case*, 2009, p. 138). He also urged that Article 6A(2) be read alongside other constitutional rights and not be interpreted narrowly. Justice Mochtar concluded that Article 6A(1) was discriminatory because citizens who met the requirements to hold presidential office in Article 6(1) could stand only if nominated by a party. Unlike party nominees, they were excluded from enjoying other constitutional rights, including those contained in Articles 27(1), 28D(3) and 28I(2). Like Justice Siahaan, Justice Mochtar also questioned why independent candidates should be permitted in regional head elections, but not presidential ones.

2.3 *Subsequent Independent Candidate Cases*

In subsequent cases applicants have put forward similar arguments for invalidation of provisions of the 2008 Presidential Election Law requiring party nomination. In response, the Court has held that the matter has already been decided, often extracting long passages from the *Independent Candidates case*

11 His dissent was, for this reader at least, difficult to follow, primarily due to illogical sequencing of argument. What follows here is an attempt to provide a readily digestible account of the dissent, which necessarily involves making presumptions about what was intended. A more literal transcription might not have been clear or coherent.

(2008). The Court has consistently declared such applications as *ne bis in idem*.[12]

3 Threshold for Presidential Nomination

As mentioned, applicants have not confined their challenges to the nomination requirement itself. Several have also challenged the level of parliamentary support required for nomination. Under the 2003 Presidential Election Law, the threshold was at least 15% of the DPR or 20% of the national vote.[13] The 2008 Presidential Election Law increased this to at least 20% of the DPR or 25% of the national vote. As we shall see, the Court has consistently held that the threshold falls within the 'opened legal policy' of lawmakers – that is, the Constitution gives the DPR discretion to impose it.[14]

3.1 Saurip Kadi Case (*2008*)

The threshold was, like the political party nomination requirement itself, challenged in the Court's early cases, including *Fathul Hadie* (2004). However, as mentioned, the Court rejected these cases for lacking standing.[15] The Court's first examination of the merits of applicants' arguments about the threshold was in the *Saurip Kadi case* (2008). Several applicants brought this challenge. One was a retired senior member of the armed forces, Saurip Kadi. His primary complaint was that the 2008 Presidential Election Law impeded his constitutional right to stand for president or vice-president. Kadi had been a military representative in the DPR during the 1990s, and had again became involved in politics in the lead-up to the 2009 elections after a coalition of 13 smaller parties sought to nominate him as their vice-presidential candidate (Widhiarto, 2011). Some of these parties also joined the case as applicants. They included

12 See, for example, *Independent Candidates* cases (2012) and (2013).

13 Articles 5(4) and 101 of the 2003 Presidential Election Law.

14 See Chapter 4 for discussion of 'opened legal policy'.

15 In the *Fathul Hadie case*, the applicants had argued that the threshold breached Article 6(1) of the Constitution. As discussed, this provision contains the prerequisites for presidential candidates, but does not mention the threshold. They argued that, therefore, lawmakers should not be able to impose one. Further, they argued that this electoral threshold breached the rights of a person who wanted to nominate themselves as a presidential candidate, when in fact various constitutional provisions required that they be facilitated, have equal opportunity, and be treated fairly and without discrimination. In particular, the threshold disadvantaged smaller parties, who were unlikely to meet it, even if they had quality candidates.

the Crescent Star Party (*Partai Bulan Bintang*), Hanura, Democratic Renewal Party (*Partai Demokrasi Pembaruan*), Prosperous Indonesia Party (*Partai Indonesia Sejahtera*), Labour Party (*Partai Buruh*), National People's Concern Party (*Partai Peduli Raykat Nasional*) and Archipelago Republic Party (*Partai Republik Nusantara*).

The applicants attacked two aspects of the 2008 Presidential Election Law. One was that holding presidential and legislative elections separately was unconstitutional, an issue to which I return later in this Chapter. Another was that Article 9 of the Law was unconstitutional. Article 9 imposes the 20–25% threshold.

Kadi argued that Article 9 was discriminatory and made it impossible for him to be nominated, thereby causing injustice and breaching Articles 1(2), 27(1) and 28I(2) of the Constitution. The majority rejected this argument. Article 9 was not discriminatory because it applied equally to all presidential candidates. It also did not prevent the applicant from being nominated. On the contrary, it entitled him, and other aspiring candidates, to be nominated by parties or coalitions that had been elected by the people and met the threshold.

The second applicant – the Crescent Star Party – argued that Article 9 of the 2008 Presidential Election Law contradicted Article 6A(2) of the Constitution. In particular, the Party argued that Article 9 went beyond Article 6A(2), which permitted political parties to nominate presidential candidates but imposed no threshold. The Party contended that any such threshold should be imposed by the Constitution itself rather than by statute. Again the majority dismissed this argument, finding that Article 9 was an 'extension' or 'elaboration' (*penjabaran*) of Article 6A(2) that remained within the 'corridor of constitutionality' within which the DPR could legislate (*Saurip Kadi case*, 2008, pp. 184–85). The majority pointed to previous cases which had upheld other electoral thresholds established by statute – including the 'next election' and parliamentary thresholds – on the same basis (*Saurip Kadi case*, 2008, p. 182).[16]

The third applicant – the remaining smaller parties – argued that the nomination threshold resulted in presidential elections being undemocratic, primarily because elected representatives whose parties or coalitions did not meet the threshold could not nominate presidential candidates. Again, the majority rejected this argument, holding that 'whether a party achieves a threshold is determined by democratic processes left to voters' (*Saurip Kadi case*, 2008, p. 185). Indeed, nomination was merely an indication of initial

16 The Court cited the *Next Election Threshold* (2007) and the *Parliamentary Threshold* (2009) cases.

support: whether candidates in fact enjoyed sufficient public support to become president or vice-president was determined in the presidential election (*Saurip Kadi case*, 2008, p. 185).

Justices Fadjar, Siahaan and Mochtar issued a joint dissent which only briefly discussed the presidential nomination threshold. They disagreed that Article 9 legitimately extended Article 6A(2):

> Article 6A(2) is very clear. It does not provide space for lawmakers to make legal policy contaminated by fabrication and ad hoc political motives by establishing a presidential threshold....
>
> *Saurip Kadi case*, 2008, p. 193

More specifically, the minority decided that Article 6A(5) of the Constitution, which states that 'procedures for the implementation of presidential elections are to be further regulated by statute', gave parliament the authority only to enact statutes about election procedures. It did not authorise parliament to tamper with candidacy prerequisites themselves, which were contained in Article 6. Because nomination was a matter of candidacy rather than procedure, Article 9 did not permissibly 'extend' Article 6A(5).

3.2 *Subsequent Presidential Nomination Threshold Cases*

In subsequent cases, the Court has largely maintained the majority's stance on the constitutionality of the presidential nomination threshold.[17] For example, in the *Simultaneous Elections case* (2013), discussed below, the majority restated that lawmakers could specify the percentage of votes a party needed to nominate a presidential candidate (*Simultaneous Elections case*, 2013, p. 85). Even the sole dissenter in that case, Justice Maria Farida Indrati, emphasised that the presidential nomination threshold was 'opened legal policy' (*Simultaneous Elections case*, 2013, p. 91).

In late 2013, another high-profile challenge against the threshold was lodged with the Court, this time by former Law and Human Rights Minister and senior leader of the Crescent Star Party (PBB), Yusril Ihza Mahendra. That party had selected him as its presidential candidate for the 2014 elections (Hukumonline, 2014d), but could not muster sufficient support to nominate him. Like applicants in previous cases, Mahendra argued that Article 9 of the 2008 Presidential Election Law was unconstitutional. The Court dismissed the *Mahendra case*

17 In some cases, the Court has referred to its decision in the *Saurip Kadi case* (2008) and thrown out the challenge for raising no new issues. See, for example, the *Sudarjo case* (2009).

(2013), holding that it had already confirmed the threshold's constitutionality in the *Saurip Kadi* (2008) and *Simultaneous Elections* (2013) cases.

4 Other Candidacy Cases

Beyond these independent candidate cases, relatively few constitutional challenges have focused upon the candidacy rules in the 2003 and 2008 Presidential Election Laws. I now turn to discuss two of them, both brought, at least in part, on grounds that particular candidacy requirements were discriminatory.

4.1 Abdurrahman Wahid Case (*2004*)

The *Abdurrahman Wahid case* (2004) was brought by former President Abdurrahman Wahid against Article 6(1) of the 2003 Presidential Election Law. This provision required presidential candidates to be 'spiritually and physically capable of performing the duties and responsibilities of President or Vice-president'.[18] Wahid had suffered several strokes and had poor eyesight. He had failed a medical test administered by the Electoral Commission, which was required for all presidential candidates (Butt and Lindsey, 2012, p. 37).

Wahid argued that Article 6(1) of the 2003 Election Law was discriminatory, thereby breaching Article 27(1) of the Constitution, which grants all citizens 'the right to equality before the law'.[19] He also argued that Article 6(1) breached Indonesia's obligations under the International Convention on Civil and Political Rights (ICCPR). However, the Court found that Article 6(1) did not in fact discriminate on these grounds. The Court pointed out that Article 6(1) of the Constitution itself required Presidential candidates to be physically and mentally capable of performing the tasks and responsibilities of the President and Vice-President. Article 6(1) of the Law was simply a statutory restatement of Article 6(1) of the Constitution and was, therefore, constitutional.

4.2 Tax Records Case (*2009*)

The *Tax Records case* (2009) was brought by three applicants.[20] They objected to Article 5(k) of the 2008 Presidential Election Law, which requires that candidates

18 Former Foreign Minister Alwi Abdurrahman Shihab was also an applicant in this case. He was denied standing as an individual, though the Court did not clearly explain why (*Abdurrahman Wahid case*, 2004, p. 24).

19 See also Articles 28C(2), 28D(1), 28D(3) and 28(2).

20 Djamal Doa (a businesswoman and former employee of the Tax Office), Abdul Hamid Usman (a lecturer) and H. Lukman Syamra (a female preacher).

have a tax file number and provide their tax returns for the previous five years. For them, a tax return constituted insufficient evidence that the candidate had paid tax. Candidates should instead be audited by the Directorate General for Taxation (Sutarto, 2009). Article 5(k) was discriminatory, the applicants argued, because ordinary citizens were subject to such audits, but candidates were not.

The Court unanimously threw out the case. For the Court, the applicant had misunderstood Article 5(k). Its purpose was not to make complying with tax obligations easier for candidates, as the applicants suggested, but rather to require that candidates adequately prove, for the purpose of their candidature, that they had paid tax. (Of course, just like other citizens, candidates were also subject to tax audits, but this was not a candidacy requirement (*Tax Records case*, 2009, p. 13).) And, even if the provision did discriminate, it did not do so on grounds mentioned in Article 1(3) of the 1999 Human Rights Law. The applicants could not demonstrate any constitutional damage and were refused standing.

5 Simultaneous Presidential and Legislative Elections

5.1 Saurip Kadi Case (*2008*)

The *Simultaneous Elections case* (2013) was not the first to deal with the constitutionality of holding presidential and legislative elections separately.[21] The first case to squarely address this was *Saurip Kadi* (2008), considered above in the context of the presidential nomination threshold. Applicants in that case also challenged Article 3(5) of the 2008 Presidential Election Law, which states that 'The election of the President and the Vice-President is to be conducted *after* the election of members of the DPR, DPD and DPRD'. Article 6A(2) of the Constitution requires that presidential candidates be nominated by political parties '*before* the general election'.

In the *Saurip Kadi case* (2008), a six-judge majority decided that holding presidential elections after legislative elections had developed as state practice or 'convention'. Under Article 3(2) of the Constitution, the MPR inaugurates (*melantik*) presidents and vice-presidents. Because the MPR comprises DPR and DPD members, the DPR and DPD elections had been held first, to constitute the MPR that inaugurated the president. According to the Court, this practice had 'ultimately replaced legal provisions' – something that regularly occurred in Indonesia and other countries. Article 3(5) of the Law was

21 The issue was raised in the first case lodged with the Court – *Fathul Hadie* (2004) – but the Court did not consider the merits of the argument because the applicants lacked standing.

consistent with this practice and hence was neither illegal nor unconstitutional (*Saurip Kadi case*, 2008, para [3.16.5]).

The Court admitted that this practice had established what it described as an 'illogical order', though it did not explain why. Yet, the Court declared, law was not always 'the same as legal logic, let alone general logic', invoking the famous quote from Oliver Wendall Holmes: 'the life of law has not been logic[;] it has been experience' (*Saurip Kadi case*, 2008, para [3.16.5]). In any event, the Court concluded that, even if it disagreed with presidential elections being held separately, it would not intervene because the legislature had discretion to determine this.

Justices Fadjar, Siahaan and Mochtar issued a joint dissent. They pointed to various previous decisions, including the *Independent Candidates case* (2008) and the *Parliamentary Threshold case* (2009). In those decisions, the Court had endorsed particular methods of constitutional interpretation, including 'textual meaning' and 'original intent'. Applying these methods, the dissenters would have upheld the application, requiring that presidential and legislative elections be held simultaneously.

Their reasoning was as follows. Article 6A(2) of the Constitution requires that presidential candidates be nominated by political parties 'before the general election'. Article 22E(2) states that 'general elections are conducted to elect members of the DPR and DPD, the President and Vice-president, and members of the DPRD'. In other words, 'general election' means a single election administered by the KPU, encompassing both presidential and legislative elections (*Saurip Kadi case*, 2008, p. 191).

The minority made several further observations. In particular, the judges rejected the majority's finding that holding separate elections had become a convention. For the minority, a convention could not be established if only practiced once. (As mentioned, direct presidential elections were held for the first time in 2004.) The dissenting judges also questioned the basis upon which this convention was said to have developed: that DPR and DPD elections needed to be held first because the MPR inaugurated the president and vice-president. According to the minority, DPR and DPD members could be installed, and the MPR then constituted, immediately before the president and vice-president were inaugurated. Holding separate elections for them was therefore unnecessary. The dissenters also referred to the efficiency gains and cost savings that would be achieved by simultaneous elections.[22] Nevertheless,

22 Many of these arguments and the arguments upon which the Court ultimately relied in the *Simultaneous Elections case* (2013), discussed below, were also made by the applicants in the *Fathul Hadie* case (2004). For example, the applicants argued that provisions requiring

they stated that they would not have insisted on simultaneous elections until 2014 because the KPU had already begun organising the 2009 elections.

5.2 Simultaneous Elections Case (*2013*)

The Court revisited its decision in *Saurip Kadi* (2008) five years later in the *Simultaneous Elections case* (2013). This challenge was brought by Professor Effendi Gazali, noted communications expert and University of Indonesia academic, known for his political parodies. Like the applicants in *Saurip Kadi* (2008), he argued that the Constitution required that presidential and general legislative elections be held simultaneously. In particular, he argued that both Articles 3(5) and 112 of the 2008 Presidential Election Law were unconstitutional. Article 112 requires that the Presidential and Vice-Presidential elections be held within three months of the general election results being announced.

A majority of the Court effectively overruled the majority decision in *Saurip Kadi* (2008), although it did not explicitly acknowledge doing so. As mentioned, in *Saurip Kadi*, the Court held that holding separate elections had become convention, which could 'replace law'. In the *Simultaneous Elections case* (2013), the Court reached the opposite conclusion, explaining that in *Saurip Kadi* the majority had made a 'choice of interpretation based on the context at the time the decision was made' (*Simultaneous Elections case*, 2013, para [3.16]). Contrary to its previous decision, the majority held that the constitutionality of holding the presidential and legislative elections separately could not be determined by reference to convention, which was not equivalent to a constitutional provision. Convention was not legally enforceable, having only 'moral' weight; breaking convention might be constitutionally inappropriate, but not unconstitutional. Echoing the minority in *Saurip Kadi* (although not explicitly referring to it), the majority declared that even assuming that convention could develop such authority, it could not emerge after being practiced only once.

Having established that it was bound by neither the convention it had recognised in *Saurip Kadi* nor the *Saurip Kadi case* itself, the majority held that having separate presidential and legislative elections was unconstitutional. The majority gave three primary justifications.

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nomination of presidential candidates after the legislative election breached Article 6A(2) of the Constitution. They also pointed out that holding two elections was unnecessarily costly and that the funds would be better spent on education, poverty-reduction and development projects. Finally, they claimed that drawing out the election process was more likely to lead to social unrest than if the elections were held together. However, as mentioned, the Court threw out the case, holding that the applicants could not prove that they had suffered constitutional loss because they were merely voters, not candidates.

The first was the strong presidential system established by the amended Constitution. While the Constitution gives the president significant power, it imposes checks and balances upon its exercise, beginning with the way the president is chosen and maintains office. The president relies primarily upon public support for legitimacy, being directly elected. He or she is neither selected by the winning party from amongst its own members, as occurs in parliamentary systems, nor able to be removed by parliament, at least without the Constitutional Court finding him or her guilty of a serious offence. However, this did not mean that the president could ignore the political parties represented in parliament. Parties and presidents relied on each other for the smooth running of government.

Potential presidential and vice-presidential candidates also rely on parties for nomination under Article 6A(2) of the Constitution. Nomination would, of course, be preceded by negotiations – between parties, to form coalitions and decide upon pairs to nominate, and between those coalitions and candidate pairs. One aim of the system was to encourage parties to merge or consolidate, to 'simplify' the party system and encourage parties to work together 'in the interests of the nation' (*Simultaneous Elections case*, 2013, p. 81). However, in practice, the primary purpose of negotiations had become to achieve short-term strategic advantage rather than long-term national benefits. Parties would form coalitions purely to support a particular candidate and then fracture after disagreeing over other issues. In the majority's assessment, therefore, the system had failed to encourage political parties who might otherwise be natural allies from coming together in coalition. Holding separate legislative and presidential elections had not promoted the checks and balances or the system of government that the Constitution sought to establish.

The majority's second justification was that the Constitution stipulated that presidential and legislative elections be held simultaneously. This was clear from the 'original intent' of the drafters of the Constitutional amendments. The Court pointed to statements made by Slamet Effendy Yusuf, a member of Ad Hoc Committee I of the MPR Working Group that prepared the draft amendments to the 1945 Constitution. The Court cited transcripts of debates in which Mr Yusuf said: 'what is intended by 'election' is election for the DPR, DPD, president and vice-president, and the DPRD. So they fall within a single election regime'. The Court referred to another of Mr Yusuf's statements indicating that general elections would employ five ballot boxes. 'Box 1 would be the DPR box, box 2 would be the DPD box, box 3 would be the president/vice-president box, box 4 would be the DPRD box, and box 5 would be the county/city box' (*Simultaneous Elections case*, 2013, p. 83, citing Mahkamah Konstitusi (2010c, p. 602)). According to the Court, this original intent was consistent with

Article 22E(2), which defines general elections to include presidential elections. Article 6A(2)'s reference to 'general elections' therefore referred to both legislative and presidential elections.

Finally, the majority justified requiring simultaneous elections by their anticipated efficiency and cost savings. Holding these elections together left more money for meeting the state's core objective – improving public welfare (*Simultaneous Elections case*, 2013, p. 84). Voters would also be able to make a more informed choice about which party to vote for in legislative elections, because parties would need to disclose, before these elections, which presidential candidates they supported.

Despite holding that separate presidential and legislative elections were unconstitutional, the Court did not require that elections be held simultaneously in 2014, fearing that this would cause disruption. The KPU had already begun organising separate elections. Perhaps more importantly, Article 22E(6) of the Constitution required that election rules be established by statute, meaning that the KPU could not bring the Court's decision into effect by issuing regulations. New legislation would undoubtedly take significant time and, if insisted upon by the Court, would likely delay forthcoming elections. Pointing to previous cases in which it had postponed the implementation or limited the legal consequences of its decisions,[23] the Court delayed its decision from coming into operation until after the 2014 elections.

Justice Maria Farida Indrati issued a sole dissent. Her primary argument was that Article 22E(6) of the Constitution delegated power to parliament to regulate how elections, including presidential elections, would be carried out, including their timing. She also criticised the majority's reliance upon 'original intent', which had led it to the opposite conclusion in *Saurip Kadi* (2008). She appeared to disapprove of using original intent as a method of constitutional interpretation, stating that it 'was not everything' and pointing out that 'initial ideas can completely change after being formulated as a norm, so in my view, original intent is not always appropriate to use in the interpretation of the norms of the constitution' (*Simultaneous Elections case*, 2013, p. 90).

5.3 *Critique and Controversy*

The timing of the release of the *Simultaneous Elections case* (2013) judgment in January 2014 was controversial. According to the decision itself, the judges had decided the case almost 12 months earlier – on 26 March 2013 – when Mahfud

23 The Court referred to its decision in the *Anti-corruption Court* case (2006) (3 year deadline) and in the *Budget cases* (limited the legal consequences of the MK's decision). For discussion of these cases, see Chapter 6.

MD was still Chief Justice. Some speculated that the Court had held back its decision for political reasons, indicating that it had been influenced by political parties (Parlina and Halim, 2014). A Judicial Commissioner even publicly opined that '[i]t is appropriate if parts of the community are suspicious of judicial corruption being present because of the time that passed before the decision was read' (Hukumonline, 2014g).

Others claimed that the Court lacked power to postpone the implementation of its decision and that, therefore, the 2014 elections themselves should be simultaneous. Former Justice Minister and Crescent Star Party presidential candidate Yusril Mahendra lodged an unsuccessful application with the Constitutional Court soon after the *Simultaneous Elections case* (2013) was handed down, using this argument.[24] He pointed to Article 46 of the 2003 Constitutional Court Law, which states that Constitutional Court decisions come into force on the date they are announced, contending that the Court could not, therefore, decide that its holdings would come into force on a later date. In the *Mahendra case* (2013), the Court did not address this argument but rather merely reconfirmed its decision in the *Simultaneous Elections* case (2013), setting out passages from the judgment explaining why it delayed the implementation of its decision.

In a press conference held soon after the Court read out its decision, the Court's longest-serving judge, Justice Harjono, denied that the Court had been pressured into delaying its decision. He explained that judges met in March 2013 and decided that the Constitution required simultaneous elections, but did not, at that time, decide whether the 2014 elections needed to be held together. Justice Akil Mochtar, the soon-to-be Chief Justice, was given the task of preparing a draft of the judgment. However, before Justice Mochtar could complete this task, the Court became swamped with Pemilukada disputes and a few months later Mochtar was arrested for corruption (Parlina and Halim, 2014). Harjono explained that, by the time the judgment was drafted and ready for release, 'circumstances had changed' and the judges agreed that the decision would not apply to the 2014 elections. Harjono emphasised that the Court had delayed the implementation of its decisions in this and other cases to 'avoid causing chaos' (Hukumonline, 2014g).

With no specific evidence indicating pressure or impropriety, Justice Harjono's account of the decision-making process should, in my view, be accepted. In previous decisions, the Court has been wary of disrupting

24 In statements made to the press, Yusril likened the decision to a corruption court issuing a prison sentence to a serving mayor but delaying its implementation until after the mayor had served out his term (Hukumonline, 2014j).

elections and is well aware of the difficulties the KPU faces when organising elections across Indonesia. These difficulties, along with alleged inefficiencies and impropriety, have been well publicised and, as we shall see in Chapter 10, the Court is continually reminded of them in the many hundreds of electoral disputes it has heard.[25] In this context, even had the decision been issued months earlier, the Court might still not have required its implementation for the 2014 elections, anticipating that, even with more time to prepare, the logistical difficulties its decision presented to the KPU might have jeopardised the successful running of the elections.

The furore surrounding the timing of the judgment's release appears to have overshadowed significant weaknesses in the decision itself. On the one hand, the Court's 'systematic' and 'textual' interpretation of the Constitution – namely using the Article 22E(2) definition of 'general election', which encompasses presidential elections, to interpret Article 6A(2) – appears sound. On this point, the majority seems to have largely followed the minority in *Saurip Kadi* (2008) (although, as mentioned, it did not specifically state that it did so). Less convincing was the Court's resort to original intent. As mentioned, the Court referred only to statements of one drafting committee member. This alone cannot possibly represent the views of all MPR members, or even a majority of them, as the Court appeared to accept. Further, resort to original intent was strictly unnecessary because the words of Article 6A(2) were clear, especially when read alongside Article 22E(2).

The 'constitutional structure' argument was also unconvincing. The Court provided no basis for asserting that the presidential nomination requirement was intended to encourage parties to form enduring coalitions. It did not, for example, examine whether this was the original intent of the Constitution's drafters, as it did when confirming the intent of Article 6A(2). Nor did it provide any basis for its view that stable coalitions provide genuine 'checks' or balances' on the exercise of state power, thereby providing additional support for its decision to require simultaneous elections.

Further, the Court's third argument – that holding elections simultaneously would bring efficiency gains – was more a policy issue than a constitutional one. To be fair, however, the Court raised this argument to support its interpretation of Article 6A(2) rather than as a 'stand-alone' constitutional argument. In any event, while holding legislative and presidential elections together might minimise inefficiencies and negotiations between political parties and candidates, it would not eradicate them. As mentioned earlier, the Constitution

25 Though the KPU had publicly announced that it could implement the decision (Hukumonline, 2014j).

provides for second-round presidential elections if no pair obtains 50% of the national vote and 20% of the vote across half of Indonesia's provinces. Of course, this second-round election must be held separately and the costs of running it are significant. Further, negotiation and horse trading could occur during that second round, with pragmatic and strategic considerations again prevailing over policy and government programs (Hukumonline, 2014b).

However, the most legally problematic aspect of the Court's decision is its treatment of *Saurip Kadi*. Even though the *Saurip Kadi* majority decision itself was highly problematic, the Court failed to explain its departure from it. As mentioned, the Court accounted for its previous decision as a 'choice of interpretation based on the context at the time the decision was made'. But this seems far from convincing: the Court explained neither this context nor how it had changed. Instead, the Court observed that the need for DPR and DPD members to be sworn in before the inauguration of the president and vice-president did not necessitate separate elections. As mentioned, the Court also held that a convention or practice could be established by a single incident and that it could override the Constitution. There seems no legal justification for this holding.

Yet the ramifications of the *Simultaneous Elections case* (2013) are significant and likely to extend far beyond the need to hold presidential and legislative elections together from 2019. This is because parties will need to enter into coalitions to nominate a pair before they know how many votes or seats they will obtain. They might be unsure about who to join with or even how many coalition partners they will need to meet the presidential nomination threshold. One result might be that parties will 'over-coalesce' – that is, form coalitions that obtain far more votes or seats than necessary to meet the threshold – to ensure that they will be able to nominate a candidate at all. This might result in cumbersome coalitions, whose members disagree on fundamental issues. This could worsen internal politicking and fragmentation that already characterises Indonesia's parliamentary practices, further hampering the DPR's ability to effectively perform its functions, including lawmaking. It could also marginalise smaller parties. The number of votes they are likely to obtain might be difficult to predict, making them less attractive as coalition partners and ultimately excluding them from nominating candidates.

Also possible is that the decision will prompt the 2014–2019 parliament to enact a statute eliminating the presidential nomination threshold altogether, perhaps preferring this to the potential uncertainties and difficulties just described. This might be a boon for smaller parties, who might then be able to field their own candidates. Yet for all the concern to simplify the party system and to prevent too many candidate pairs standing for presidential election,

this is unlikely to result in an unworkably large number of candidate pairs (Chen and Priamarizki, 2014). This is because the number of presidential candidates will not exceed the number of political parties represented in parliament, which is limited by the parliamentary representation threshold discussed in Chapter 7, currently set at 3.5%.

6 Future Challenges to Presidential Elections

In my view, there remain at least two potential bases upon which the 2008 Presidential Election Law – or its successors, presuming they are similar – could be challenged. First, in the cases thus far, the Court has considered only whether the presidential nomination threshold is constitutionally valid per se. To my knowledge, the Court has not assessed the constitutionality of the threshold being set at 20/25%, rather than some lower figure. There may well be scope to challenge the constitutionality of this percentage, particularly if it is increased. As mentioned, while the Constitution requires that candidates be nominated by a political party or coalition, it does not specify the percentage of seats or votes that that party or coalition must hold. There could be a point at which the threshold is so high, and the potential for nomination so limited, that the constitutional right to stand becomes an impossibility for all but a handful of Indonesians.[26] For example, if only one party or coalition could meet the threshold, then perhaps the right to vote would also be nullified. Without at least two candidate pairs, it is difficult to see how an election could be characterised as 'free and fair' as required by Article 22E(1) of the Constitution.

Second, independent presidential candidates remain a future constitutional possibility. In the *Farhat Abbas case* (2013), the party nomination was challenged once more. While the Court rejected the application, it stated that the dissenting judges in the *Independent Candidates case* (2008) continued to maintain their objection to the majority view in the present case (*Farhat Abbas case*, 2013, para [3.21]). This reference to the dissenting opinion was vague – it specified neither the particular arguments the dissenters maintained nor which of the dissenting judges maintained them. Indeed, Akil Mochtar was the only judge to sit on both cases. However, this is, to my knowledge, the only

26 As the Court put it in the *Parliamentary Threshold case* (2009, para [3.19]), the size of the threshold falls within the jurisdiction of lawmakers to determine without interference by the Constitutional Court, provided that it does not contradict political rights, the people's sovereignty and rationality.

reference to a dissenting opinion made in a majority judgment since the Court's establishment. The reference could be taken to indicate that the Court might revisit this issue as its composition changes. This assumes, of course, that a future applicant identifies an additional constitutional ground upon which to bring a claim, or the 2008 Presidential Elections Law is replaced but retains the nomination requirement, so as to avoid *ne bis in idem* problems.

PART 4

Constitutional Court Returns Jurisprudence

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CHAPTER 10

Electoral Disputes before the Constitutional Court

Between 'Mahkamah Kalkulator' and 'Substantive Justice'

One of the Constitutional Court's most regularly-exercised and important tasks is 'resolving disputes about the results of elections' (*memutus perselisihan tentang hasil pemilihan umum*) (Article 24C(1) of the Constitution). Upon its establishment, the Court had power to resolve only disputes arising out of 'general elections' as defined by Article 22E of the Constitution: elections for the national parliament (DPR), subnational parliaments (DPRDs), the regional representative council (DPD), and the presidency.[1] As mentioned in Chapter 7, national and regional legislative elections were held in 2004, 2009 and 2014. Each legislative election was followed by presidential elections three months later. The Court resolved disputes arising out of these elections within only a few weeks of the formal announcement of results by Indonesia's national, provincial, city and county electoral commissions.

As also mentioned in Chapter 7, direct regional head elections (*Pemilukada*) commenced from 2005, and the Constitutional Court heard disputes arising out of them from 2008. These elections occur every five years or so in each province, city and county of Indonesia, but are staggered so that they take place on a rolling basis rather than simultaneously. Because Indonesia has 34 provinces and over 500 cities and districts, many of these elections are held each year, except in national legislative election years, during which *Pemilukada* are usually not held. Indeed, home Affairs Ministry officials joke that a regional election takes place almost every day somewhere in Indonesia (Tempo, 2012). The Court has heard many disputes arising from them.

Electoral disputes are brought by electoral 'participants' or 'applicants' – usually political parties, sometimes individuals – and must be lodged with the Court within 72 hours of the KPU announcing the result (Article 74(3) of the 2003 Constitutional Court Law). The respondent in these cases is the

1 According to Article 74(2) of the 2003 Constitutional Court Law, these challenges are, in essence, to the 'stipulation of the result of the election' (*penetapan hasil pemilihan umum*), announced by the KPU, which affect: the election of a candidate to the DPD; the election of a pair of presidential candidates or the determination of a pair of candidates to contest a second-round presidential election; or the allocation of parliamentary seats in an electoral district.

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KPU – whether national, provincial, county or city – which announced the election result and declared the winner, often with the local electoral supervisory committee (*Panwaslu*, or *Panitia Pengawasan Pemilu*). Other parties or pairs contesting the election or electoral district where the dispute emerged can appear as 'related parties' (*pihak terkait*) and are afforded almost the same opportunities as respondents to make arguments and adduce evidence.

1 Differing Approaches

This Chapter analyses the Court's decision-making in the various types of electoral disputes it has resolved since its establishment. The account proceeds chronologically, beginning with the Court's first batch of electoral disputes in 2004. The Court appears to have approached resolving disputes arising out of each election differently, though sometimes the differences have been slight. For example, the Court took a similar approach in handling each of the 2004 and 2014 legislative election disputes, largely functioning as a 'Calculator Court' (*Mahkamah Kalkulator*) (Junaidi, 2013). In these matters, the Court focused on double-checking the counts and tallies of electoral commissions, both regional and national, and ensuring that documents upon which they relied were authentic. Where the Court uncovered errors or manipulated counts, it stipulated the 'correct' count in its decision. Yet despite the similarities in the nature of the Court's enquiry in these cases, it awarded different remedies in 2004 and 2014. In particular, the Court ordered recounts in some electoral districts in 2014 – something it did not do in 2004.

By 2008, the Court was handling *Pemilukada* disputes and, in its decisions, introduced 'substantive justice' tests, ordering recounts and even some re-elections when faced with evidence that electoral administrators or competing parties had violated electoral laws in a 'structured, systematic and massive' way. In other words, the Court shifted from checking vote counts to checking for improprieties occurring before voting or counting took place. For example, the Court ordered several re-elections in the face of widespread vote buying by competing parties and official bias against particular candidates.

By contrast, the Court's 2009 resolution of legislative election disputes adopted a hybrid approach. The Court performed primarily as a 'calculator', but included in its decisions smatterings of the 'substantive justice' discourse of the *Pemilukada* cases, albeit inconsistently and apparently limited to violations by officials at polling stations and during vote recapitulations.

As we shall see, the Court has recently decided that it no longer has jurisdiction to hear *Pemilukada* disputes – a decision that appears to have been subsequently confirmed by statute. One important question will be the extent to which the jurisprudence it developed in the *Pemilukada* cases will be carried over to the types of electoral disputes that it continues to handle. If its approach to the 2014 legislative and presidential election disputes are any guide, the continuing influence of this jurisprudence will be minimal.

2 2004 Elections

2.1 *Legislative Elections*

The 2004 legislative elections were contested by 24 parties. Only one of them – the Indonesian Nahdlatul Community Party (*Partai Persatuan Nahdlatul Ummah Indonesia*) – chose not to challenge the results in the Constitutional Court (Purwadi, 2006, p. 216). The Court heard 273 disputes, 252 of which were lodged by political parties and 21 by DPD candidates. According to the Court's figures, it 'upheld the application' in 38 (or around 15%) of these cases (Asshiddiqie, 2008, p. 161).

Before turning to discuss these disputes, a general explanation of the vote counting and recapitulation (*rekapitsulasi*) process might help readers understand the nature of complaints applicants often make in legislative and presidential election disputes. Polling officials record counts from polling stations in so-called 'C-1' forms. The results in C-1 forms are then entered into a 'DA-1' – the form in which C-1 form data from polling stations in a village area is collated. These forms are then collected at the sub-district level, where village-level tallies are further consolidated into a 'DB-1' form. Once tallied at this level, they are aggregated at the city or county level and then, for provincial and national parliamentary elections, the provincial level.

Most complainants target mistaken or deliberate reduction or 'deflation' (*penggembosan*) of their votes, or the 'inflation' (*penggelembungan*) of the votes of their competitors, when the votes were counted at polling stations, or consolidated or aggregated with other votes. Some allege that counts and recapitulations have been doctored and ask the Court to determine the 'correct' count based on original or authentic forms. Most argue that they would have obtained a seat but for the errors or improprieties.

The Court threw out most of the 2004 legislative election disputes, primarily because applicants adduced insufficient documentary evidence or witness testimony to support their arguments (Asshiddiqie, 2008). Many produced their own counts and recapitulations as evidence of the KPU's mistakes and

improprieties.[2] However, the Court generally preferred the KPU's formal documents in which counts were recorded, signed by polling station officials and witnesses, and bearing an official KPU stamp.[3] Some applicants claimed that they should have obtained a particular number of votes, but could not support the figure with sufficient evidence,[4] such as formal electoral documents or relevant witness testimony from reliable officials. In at least two cases, applicants submitted press reports containing vote counts as evidence of those counts, leading the Court to reject their claims.[5]

The Court also turned down applications that did not specify the number of votes 'lost' and the electoral districts in which those losses occurred, even if the Court accepted that votes had been manipulated.[6] The Court also rejected applications that, if accepted, would not have changed seat allocations, either for the applicants or other parties competing in that electoral district.[7] Generally speaking, applicants succeeded only if they put forward arguments based on evidence that the KPU did not refute (*membantah*).[8] Yet the only redress the Court provided was stipulating the correct vote count. As mentioned, it awarded no recounts or revotes in 2004.[9]

2.2 *Presidential Elections*

In the *Wiranto Challenge* (2004), Wiranto, former Commander-in-Chief of the Indonesian Army (*Tentara Nasional Indonesia*, TNI) and Golkar presidential nominee in 2004, with his vice-presidential running mate, Salahuddin Wahid,

2 See *PNI Marhaenisme application* (2004); *Partai Bulan Bintang application* (2004); *Partai Merdeka application* (2004); *Partai Perhimpunan Indonesia Baru application* (2004); *Partai Nasionalis Banteng Kemerdekaan application* (2004); *Partai Demokrat application* (2004); *Partai Penegak Demokrasi Indonesia application* (2004); *Partai Karya Peduli Bangsa application* (2004); *Partai Demokrasi Indonesia Perjuangan application* (2004); *Partai Golongan Karya application* (2004).

3 *Partai Merdeka application* (2004); *Partai Penegak Demokrasi Indonesia application* (2004).

4 See *PNI Marhaenisme application* (2004); *Partai Keadilan dan Persatuan Indonesia application* (2004); *Partai Golongan Karya application* (2004).

5 See *PNI Marhaenisme application* (2004); *Partai Demokrat application* (2004).

6 See, for example, *Partai Penegak Demokrasi Indonesia application* (2004); *Partai Keadilan dan Persatuan Indonesia application* (2004).

7 *Partai Bintang Reformasi application* (2004); *Partai Demokrasi Indonesia Perjuangan application* (2004).

8 See, for example, *Partai Kebangkitan Bangsa application* (2004); *Partai Keadilan Sejahtera application* (2004); *Partai Demokrasi Indonesia Perjuangan application* (2004).

9 Such as was sought in the *Partai Buruh Sosial Demokrat application* (2004) on grounds that the KPU had not complied with the 2003 General Election Law. Ambitiously, the applicant in this case also sought an order from the Court to disband the KPU.

disputed the results of the 2004 direct presidential elections. The Wiranto-Wahid pair had placed third, with 22% of the vote, behind Susilo Bambang Yudhoyono and Jusuf Kalla (33.5%) and Megawati Soekarnoputri and Hasyim Muzadi (26.5%). The Yudhoyono and Soekarnoputri pairs were set to compete in a second-round run-off election.

As in the 2004 legislative election disputes, the Court focused on the correctness of vote counting and tallying, holding that the applicants had provided insufficient evidence of the errors and irregularities which, they alleged, resulted in their losing 5.5 million votes across 26 provinces (*Wiranto Challenge*, 2004, p. 136). The applicants also complained about various problems with electoral administration, including irregularities at polling stations and in the final results announced by the KPU. However, the Court refused to entertain these arguments, holding that *Panwaslu*, the KPU and the police were responsible for handling those types of allegations. The Court said:

> The position of the Court in electoral disputes is not as a court of appeal or cassation for various disputes arising out the elections, for which sectoral and local legal remedies are available. Rather, the Court operates as a judicial institution of first and final instance for disputes about the results of Presidential and Vice-Presidential Elections which are determined and announced by the KPU. [The Court is therefore] concerned with quantitative matters – that is, significant figures in the final results of elections. Qualitative matters will attract the concern of the Constitutional Court only if electoral principles stipulated in the Constitution…are violated.
>
> *Wiranto Challenge*, 2004, p. 54

The Court found that the violations about which the applicants complained did not threaten to violate these electoral principles and, from a quantitative perspective, were insufficient to have pushed the applicant into a second-round run-off election. However, the Court suggested that the KPU consider the applicants' concerns about how the election was conducted when administering the second-round run-off election (*Wiranto Challenge*, 2004, p. 54).[10]

10 This second-round election was contested by Susilo Bambang Yudhoyono and Jusuf Kalla, against Megawati Soekarnoputri and Hasyim Muzadi.

3 Pemilukada (2008–2012)[11]

As mentioned, direct *Pemilukada* elections commenced from June 2005.[12] Before its amendment, the 2004 Regional Government Law allowed competitors in city or county elections to challenge the final vote count in Indonesia's provincial high courts. If dissatisfied, contestants could then appeal to the Supreme Court.[13] Competitors in provincial elections could directly dispute results before the Supreme Court.[14] From a reading of several available reported *Pemilukada* cases (Rohaedi and Bagijo, 2006), the Supreme Court and the provincial high courts accepted the confines of their jurisdiction. These courts did no more than ensure that the final vote count had been tallied correctly, and that it was based on correctly formalised documents – the approach taken by the Constitutional Court in the 2004 elections just mentioned.

The Supreme Court explained this approach in the *Central Sulawesi Provincial Elections case* (2006), where it discussed Article 106(2) of the 2004 Regional Government Law, which allowed candidates to object 'only to the results of the counting of the votes that influenced the election of candidates'. According to the Supreme Court, the word 'only' indicated that lawmakers intended to limit its jurisdiction to count-checking.[15] The Supreme Court admitted that it could 'understand the disappointment of the applicants' because, in the face of evidence of significant infringements of electoral laws that might have affected the outcome, it was powerless to provide redress.

Then came the *Depok* case (2005).[16] In August 2005 the West Java High Court in Bandung heard a dispute over the result of the mayoral elections held in the previous month in Depok, West Java. About 700,000 of more than one million eligible voters took part in this election. The Depok Electoral Commission had declared the Prosperous Justice Party (*Partai Keadilan Sejahtera* (PKS)) pair Nur Mahmudi Ismail and Yuyun Wirasaputra as the winners with 232,610 votes,

11 This analysis of the Court's decisions in *Pemilukada* disputes draws from Butt (2013).

12 The first Pilkada was held in Kutai Kertanegara county, East Kalimantan, on 1 June 2005 (Emilia, 2005).

13 More specifically, contestants must lodge a request with the Supreme Court to re-examine the case through the *peninjauan kembali* process, discussed in Chapter 5.

14 Articles 106 (1) and (2) of the 2004 Regional Government Law; Hukumonline, 2010.

15 The Court made similar statements in Supreme Court Decisions 03 P/KPUD/2005 and 04 P/KPUD/2005.

16 Though this was not the only controversial High Court decision in an electoral dispute. Also problematic were the North Maluku and South Sulawesi Pilkada electoral disputes, discussed in Indrati (2012).

with Golkar candidates Badrul Kalam and Syihabuddin Ahmad obtaining 206,781 votes. The Kalam pair challenged the result, claiming that local election commission officials and the Ismail pair had deliberately violated election laws, with the result that many of their supporters had not received invitations to vote and some people who were ineligible had been able to vote. They estimated that they thereby lost around 65,000 votes. The High Court agreed and declared the Kalam pair as the winners, awarding them 269,551 votes to Ismail and Wirasaputra's 204,828.

The High Court's decision was problematic for at three main reasons, all of which were widely reported in the Indonesian press and drew speculation that the decision was the result of impropriety. First, the witness testimony upon which the Court relied appeared to be questionable. The testimony presented was one-sided, with most of it coming from Kalam supporters who claimed that they had been unable to cast their votes for the Kalam pair (Diani and Suwarni, 2005). Other 'witnesses' alleged vote-rigging but without witnessing it themselves, having only been told about it by Golkar members (Dursin, 2005). The High Court did not seek to verify or scrutinise this testimony, simply accepting that it had been given under oath and noting that the Ismail pair had not contested it (*Depok* case, 2005, p. 64).

Second, the High Court presumed that those who claimed they were unable to vote would have voted for Kalam rather than others, and that all ineligible voters chose Ismail (Dursin, 2005). Third, the Court did not limit itself to checking the correctness of the vote count. Rather, it considered violations that affected citizens' ability to vote (Diani and Suwarni, 2005). In other words, the Court went far beyond what Article 106(2) of the 2004 Regional Government Law authorised it to do.

In a piece in the *Jakarta Post*, an English-language daily newspaper, Dursin (2005) captured the widespread disdain for the High Court's decision:

> Politicians, public figures or anyone aspiring for a public office may now have a new way of achieving their ambitions – through a legal battle in court…The requirements are simple and reasonably easy to meet. First, get a political party to nominate you; secondly, contest the election result if you happen to loose [sic] and; thirdly, enlist people who have enough guts to testify (or perhaps to lie) under oath that your rivals have robbed you of your election victory either by illegally inflating their vote tally or preventing your supporters from casting their votes…Do not worry about the validity of their testimonies; the honorable judges will not bother to verify them. The fact that the testimonies are given under oath means they must be true…As for your supporters who did not cast their votes,

> the judges will take care of them. Once you have submitted "all of the requirements", just sit back and wait for your inauguration.

The Electoral Commission appealed to the Supreme Court. The Court annulled the High Court's decision and reinstated Nur Mahmudi Ismail and Yuyun Wirasaputra, noting that the 'High Court's verdict was based only on assumptions, not facts' (*Depok Appeal* (2005)) and held that the High Court had not limited itself to count-checking. The Supreme Court declared that 'neither the Supreme Court nor the High Court have jurisdiction to adjudicate breaches in the running of the election other than those relating to the determination of the vote count' (*Depok Appeal*, 2005, p. 22).

Despite the Supreme Court's decision, dissatisfaction about the High Court's decision in the *Depok* case remained strong. Indeed, it is considered to be the main catalyst for the national parliament transferring jurisdiction over *Pemilukada* disputes from the Supreme Court to the Constitutional Court in late 2008 (DPR, 2010). Presumably, the Constitutional Court's successful record in handling disputes arising out of the general and direct presidential elections in 2004 made it an attractive alternative.

The Constitutional Court initially took a 'mathematical' approach in these disputes, limiting itself to checking local electoral commission counts for mistakes. If errors were found, the Court would replace the commission's count with its own. The Court generally disregarded arguments that violations occurred which had affected the election result. It maintained that it lacked jurisdiction to entertain such arguments, pointing to Article 106 of the 2004 Regional Government Law, mentioned above.[17]

It was not long, however, before the Court pushed the boundaries of its newly-acquired jurisdiction. After hearing about a dozen *Pemilukada* cases, the Court decided that it would no longer allow its function to be limited to checking vote counts.

3.1 East Java Case (*2008*)

In November 2008, the East Java Electoral Commission declared Sukarwo and Saifullah Yusuf as the duly elected Governor and Deputy Governor of East Java province respectively. They had narrowly won a second-round run-off election, receiving 7,729,944 votes (50.2% of the total votes) to the 7,669,721 votes (49.8%) of their competitors – Khofifah Parawansa and Mujiono (the 'Khofifah pair') (Piri and Saraswati, 2008). The Khofifah pair disputed the result before

17 See, for example the *Luwu Kabupaten case* (2008), although compare the *Kepulauan Talaud case* (2008).

the Constitutional Court, alleging that numerous mistakes or improprieties had occurred in 26 counties or cities in the province. In particular, they claimed that in some polling stations officials had used leftover ballot papers to lodge hundreds of additional votes for the Sukarwo pair (in some villages, the number of votes exceeded the number of registered voters by several fold) or had made up the vote count in the Sukarwo pair's favour. The Khofifah pair estimated that, taking these breaches into account, they won by 22,461 votes. They asked the Court to invalidate the results of the run-off and declare them the winners (*East Java case*, 2008, para [3.27]).

In response, the Sukarwo pair argued that their election victory should be upheld, presenting documentary and witness testimony to demonstrate the absence of significant impropriety or miscounting. The respondents, the East Java Electoral Commission, argued that Article 260C of the 2004 Regional Government Law gave the Constitutional Court power only to investigate and correct miscounts. According to the Commission, the Court therefore lacked jurisdiction to consider whether fraud or other violations of electoral law had occurred. Any alleged administrative violations should be reported to the relevant election supervision committee (*Panwaslu*), and any suspected criminal activity to police.

The Court rejected the submissions of both the Khofifah pair and the Commission. The applicants had adduced insufficient evidence of mistakes or impropriety (*East Java case*, 2008, para [4.1]). According to the Court, the applicants had presented only 'preliminary indications' of fraud and errors, which did not constitute 'valid' evidence under Indonesian law. In any event, the local election commission and the Sukarwo pair had successfully refuted this evidence with their own.

This was not the end of the matter, however. The Court *itself* identified impropriety in three of the four counties comprising the island of Madura, located off of East Java. These counties were Sampang, Pamekasan and Bangkalan, and the Sukarwo pair had won all of them.[18] The Court accepted that Sukarwo had, in these three counties, made a 'contract' with village administrators under which he pledged to pay them a lump sum for helping him win the election. The amount depended on the number of villagers who voted and the percentage of votes the Sukarwo pair received as indicated in the following table reproduced in the judgment (*East Java case*, 2008, para [3.24.1]).

18 The remaining county in Madura is Sumenep. Even though the applicant alleged that impropriety had occurred there, the Court did not mention Sumenep in its judgment.

Number of voters present	Percentage of votes obtained in villages			
	51–60%	61–70%	71–80%	81–100%
Less than 2500	Rp 50 million	Rp 60 million	Rp 70 million	Rp 80 million
2501–5000	Rp 60 million	Rp 70 million	Rp 80 million	Rp 100 million
5001 and above	Rp 70 million	Rp 80 million	Rp 100 million	Rp 150 million

Under the agreement, Sukarwo also promised other types of financial assistance, such as stimulant funds, support for local state enterprises and increased allowances for village heads and other officials.

The Court also found that over 20 village heads had signed another document in which they pledged support for the Sukarwo pair. They had been approached by a man named Haji Ali, who admitted, in a formal statement made before a notary in Sidoardjo and obtained by the Court, to arranging this agreement (*East Java case*, 2008, paras [3.24.1–3.24.3]). Some Sampang polling officials admitted, also before a notary, to increasing the votes for the Sukarwo pair by perforating surplus ballot papers. This evidence, combined with 'other evidence' which the Court did not specify, indicated that electoral laws had been violated. The Court ordered fresh elections in those three counties (*East Java case*, 2008, para [3.34]).

To issue this decision, the Court needed to address two legal roadblocks, and did so using arguments discussed below. The first problem was that, as mentioned, the Court had statutory jurisdiction to recheck only 'final vote recapitulations', not violations of election laws, whether administrative or criminal. The second problem (related to the first) was that if these types of violations occurred, ordering a recount would be an ineffective remedy because the impropriety had occurred before the vote. A recount would only confirm the recapitulation, unless a mistake had been made in counting. The Court needed a legal justification to order re-elections.

3.1.1 Adjudicating Breaches of Electoral Laws

In the interests of ensuring 'substantive justice' and 'upholding democracy and the Constitution', the Court refused to be confined to checking the vote count recorded in the official election documents. The Court's constitutional argument to justify this self-proclaimed 'breakthrough to advance democracy' (*East Java case*, 2008, para [3.27]) was as follows. The transfer of jurisdiction from the Supreme Court to decide *Pemilukada* disputes was not merely a 'transfer of institutional authority'. Rather, it changed the nature of *Pemilukada*

electoral dispute resolution because the Constitutional Court was the 'guardian of the Constitution'. The Court needed to ensure that its decisions maintained important constitutional principles.

One such principle was democracy: Article 1(2) of the Constitution places sovereignty in the hands of the people; Article 18(4) required that *Pemilukada* be democratic; and Article 22E(1) that elections be direct, public, free, secret, honest and just. For the Court, its obligation to safeguard democracy extended to addressing violations occurring when democracy was 'implemented' during all stages of *Pemilukada*, including the lead-up to them (*East Java case*, 2008, para [3.29]).

Another important constitutional principle was justice. Article 28D(1) stated that 'Every person has the right to recognition, guarantees, protection and legal certainty that is just, and to equal treatment before the law'. The Court declared that 'upholding justice' required it to assess alleged violations of electoral laws that led to disputed results (*East Java case*, 2008, para [3.28]).

In this context, achieving what the Court called 'substantive justice' could not be hampered by procedural limitations, particularly when constitutional principles were at stake (*East Java case*, 2008, para [3.27]). One such limitation was Article 106 of the 2004 Regional Government Law, which the Court labelled 'very limited', 'inflexible', 'unclear' and an impediment to 'truth' and 'justice' (*East Java case*, 2008, paras [3.25], [4.4]).

The Court also advanced two non-constitutional arguments to help justify adjudicating violations of electoral laws. First, other institutions had not satisfactorily handled *Pemilukada* disputes (*East Java case*, 2008, paras [3.25], [3.27]) and the Court seemed concerned that violations of electoral rules would remain unremedied without its intervention. Standing idly by would, in effect, sanction breach of what the Court described as a universal principle of law and justice: 'no one can benefit from their own violations and infringements and no one should be disadvantaged by the violations and infringements of another'. Election candidates must not, therefore, 'be disadvantaged in obtaining votes as a result of a breach of the Constitution and the principle of justice' (*East Java case*, 2008, para [3.27]).

Second, alleged breaches of election laws remained within the corridor of resolving disputes over election results. After all, significant breaches affected the final vote count. And in investigating these violations, the Court would not intrude upon the jurisdiction of other courts. The general courts could still handle election-related crimes and the administrative courts could still adjudicate and punish the wrongdoings of election officials (*East Java case*, 2008, paras [3.28], [4.6]).

3.1.2 Ordering Recounts and Revotes

The Court decided that it could order recounts or even revotes 'after considering all the evidence put before it during the case hearings' (*East Java case*, 2008, para [4.5]). Before reaching that conclusion, however, the Court considered the types of violations that would justify a recount or revote. These were breaches that 'significantly influence the final result' and carry 'significant weight' in their 'impact upon the number of votes obtained by each pair' (*East Java case*, 2008, paras [3.25]–[3.28]). They must be 'systematic, structured and massive', with the 'intensity and magnitude' of the violation determining whether a revote or recount would be ordered (*East Java case*, 2008, para [4.2]). By contrast, 'mostly personal' or 'not very significant' violations would not suffice (*East Java case*, 2008, para [3.33]).

The Court neither defined the types of violations that were 'systematic, structured and massive' nor explained how significant they needed to be to justify a revote over a recount. The Court did observe, however, that a recount would be inappropriate if improprieties took place before or after voting, rather than during (*East Java case*, 2008, paras [3.32]–[3.33]). This was because a recount would almost certainly lead to the same result (*East Java case*, 2008, para [3.33]).

Even though the Court has mentioned and apparently applied the *East Java* tests in many subsequent cases, it did not, to my knowledge, comprehensively defined any of them. (In some cases the Court has inconsistently cast the test. For example in one case, it referred to violations needing to be 'serious, significant and structured' (Widjojanto, 2009, p. 54).) The Court has, however, provided clues in subsequent cases about what types of violations were structured, systematic or massive.[19] 'Structured' encompasses violations involving local government institutions or officials working collectively rather than individually (*Pekanbaru Mayoral Election* case, 2011; *Konawe Selatan Election* case, 2010). 'Massive' violations usually affect much of the electorate. 'Systematic' means that the violation was planned (*Mandailing Natal Bupati Election case*, 2010, para [3.24.2]). The same interpretations appear in the following extract from one of former Chief Justice Mahfud's biographies:

> Structured means performed through the tiers of the hierarchy of government power, involving provincial officials, regents, sub-district heads, village heads etc. Systematic means with deliberate planning, through

19 These observations were confirmed in interviews I conducted with former Constitutional Court judges and registrars in Jakarta in June 2012.

> meetings, contracts which target particular votes, even by instructing someone to do something which violates electoral rules. For example, ordering a village head to mark all ballot papers. And massive means the number of votes obtained fraudulently is very large.
>
> Budiarti et al., 2013, p. 90

3.2 *Breaches Leading to Court-ordered Recounts or Revotes*

The types of violations that led the Court to order revotes or recounts were 'money politics' or vote buying; candidate pairs co-opting public servants or using public facilities or programs to assist in their election campaigns, particularly during cooling off periods ('politicisation of the bureaucracy'); impropriety or incompetence of the local electoral commission ('KPU breaches') and intimidation.[20] The Court was also commonly asked to determine whether the local electoral commission had, erroneously or deliberately, either allowed a candidate to stand who did not meet the candidacy requirements, or refused to allow a candidate to stand even though he or she met the requirements ('candidacy cases'). All of these breaches constitute contraventions of Indonesia's 2004 Regional Government Law[21] and other lower-level laws. I now discuss each type of breach.

3.2.1 Money Politics and Intimidation

The most common allegation made before the Constitutional Court in *Pemilukada* cases was undoubtedly that another candidate pair engaged in 'money politics' or 'vote buying' during the election campaign or on polling day. To my knowledge the Court provided no definition of money politics, though it is commonly understood to occur when candidates, their support teams or sympathisers, give or promise money or goods to voters, election administrators, the bureaucracy or security forces, so that they vote for, or are partial towards, a particular pair.

Money politics was the main reason for the Court ordering revotes in several cases. For example, in the *Tanjung Balai Mayoral Election case* (2010), the

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20 I have based my analysis in this section upon a study of 46 Constitutional Court decisions in *Pemilukada* disputes. These cases comprise all of the cases in which the Constitutional Court ordered recounts or fresh elections arising from *Pemilukada* held in 2008–2011 and heard by the Court into 2012. I have focused on the formal decisions of the Court rather than the written transcripts of proceedings and the submissions of the parties.

21 For example, money politics is prohibited under Article 116; politicisation of the bureaucracy under Article 16; various KPU breaches under Article 118; and intimidation under Article 117. Many candidacy rules are contained in Article 115.

Court accepted that the winner's 'Support Team' (*Tim Sukses*) had promised to pay citizens to vote for a particular pair (though the Court did not indicate how much they were paid). In the *Mandailing Natal County Election case* (2010), the Court found that the victorious pair had established a 'Volunteers Team', which had not been registered as required by law[22] and had distributed cash and vouchers worth Rp 20,000, 30,000, and 100,000 to eligible voters across 'almost all' sub-districts in Mandailing Natal. The winning pair claimed that the vouchers were given to Volunteer Team members to repay their expenses. But the Court found that the number of vouchers far outnumbered the number of Team members and the applicant proved that many vouchers, and cash, were handed out to eligible voters for voting for the winners (*Mandailing Natal County Election case*, 2010, para [3.24.2]). (Ironically, the vouchers, instead of cash, were issued as part of a campaign to publicise the prohibition on candidate pairs promising or giving money to influence voters (Junaidi, 2010, p. 41).)

Usually, however, money politics was alleged alongside other violations such as politicisation of the bureaucracy. In these cases, relatively small cash handouts to citizens or local government officials,[23] donations to local institutions such as mosques,[24] and even basic necessities such as clothes, food and electricity generators,[25] have constituted money politics.

The Constitutional Court also found that 'intimidation', including threats of physical violence, took place in several cases. Intimidation was not, however, an independent factor leading the Court to invalidate an election.[26]

3.2.2 Politicisation of the Bureaucracy

Allegations of politicisation or co-option – usually made against an incumbent regional head or deputy seeking re-election, or a family member of that incumbent – were almost as common as money politics. When the Court ordered recounts or revotes, however, 'politicisation' was rarely the only ground established; most often, applicants also proved that the incumbent engaged in money politics.

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22 Electoral Commission Regulation 69 of 2009.

23 Such as in the *Sintang Bupati* (2010); *Pandeglang Bupati* (2010); and *Konawe Selatan* (2010) election cases.

24 For example in the *Gresik* (2010); and *Sumbawa Bupati* (2010) election cases.

25 See, for example, the *Sumbawa Bupati election case* (2010).

26 The Court has rarely specified the precise threat. See, for example, the *Kotawaringin Barat* (2010); *Ketapang Kabupaten* (2010); *Manokwari Bupati* (2010); and *Merauke Bupati* (2010) election cases.

Examples of 'politicisation' prompting the Court to order recounts or revotes include incumbents:

- making campaign speeches or attempting to garner support at official government meetings or launches of government programs;[27]
- 'directing' public servants and officials to support them;[28]
- ordering local government officials, village heads, sub-district heads and teachers to put up campaign posters around their houses;[29]
- threatening to transfer or sack civil servants who refused to support them;[30] and
- using government facilities to coordinate their election campaigns (*Tanjungbalai Election case*, 2010).

In one case, the Court found that the incumbent had violated election laws by using government officials to organise a public school marching band, with the symbols of the incumbent's political party affixed to the instruments, for use in an election campaign (*Tebo Bupati Election case*, 2011).

Using official government programs or funds to one's electoral advantage can resemble money politics because it involves candidates giving something in return for electoral support. Examples include promising equipment, such as motorbikes for schools; pledging extra funding for neighbourhood associations; and issuing food rations to community members.[31] What appears to distinguish these disbursements from money politics is that they probably would have been legal had they not been 'tied' to the campaign, usually by being made during the cooling off period.[32] If the incumbent demonstrated that the government program or its actions were routine or had been planned and budgeted well before the election, then the Constitutional Court often decided that no violation occurred.[33]

27 See, for example, the *Cianjur Bupati* (2011); *Gresik Bupati* (2010); *Tanjungbalai* (2010); and *Manado Mayoral* (2010) election cases.

28 See, for example, *Tebo Bupati* (2011); *Pandeglang Bupati* (2010); and *South Tangerang Mayoral* (2010) election cases.

29 As in the *Manado Mayoral election case* (2010).

30 Such as in the *Sumbawa Bupati* (2010); *Manado Mayoral* (2010); and *Kotawaringin Barat* (2010) election cases.

31 As was alleged in the *Cianjur Bupati* (2011); and *Manado Mayoral* (2010) election cases.

32 Most of these disbursements contravene Home Affairs Minister Circular 270/214/SJ, 25 January 2010.

33 See, for example, *Tomohon Mayoral* (2010); *Manado Mayoral* (2010); and *Cianjur Bupati* (2011) election cases.

3.2.3 Electoral Commission Breaches

The Court ordered recounts and revotes when a local electoral commission committed breaches that brought the legitimacy of the election into question. For example, in the *North Tapanuli Bupati Election case* (2008, para [3.31]), the Court found that 'serious and significant' breaches had affected the votes obtained by each candidate pair. In particular, 6,000 eligible voters had been unable to vote because the North Tapanuli Electoral Commission had not sent them voting invitations.[34] More significant, however, were the 26,000 duplicate single identity numbers appearing on the electoral roll in 14 out of the 15 sub-districts of North Tapanuli. The Court declared that the North Tapanuli Electoral Commission had been 'manipulative, full of intimidation, dishonest and arbitrary' and had thereby 'betrayed democracy' and Articles 22E(1) and 18(4) of the Constitution (*North Tapanuli Bupati Election case*, 2008, paras [3.30, 4.3]). The Court ordered fresh elections in those 14 sub-districts.

While in the *North Tapanuli case* (2008) the Court appeared to attribute responsibility for the electoral roll's accuracy to the local electoral commission, in many subsequent cases it has been slower to do so. In those cases, the Court has observed that maintaining the electoral roll is a national administrative matter over which local electoral commissions have little control.[35]

The Court has ordered local electoral commissions to hold fresh elections for other administration-related violations, including failure to:

- open ballot boxes in the presence of witnesses representing those contesting the election or to allow witnesses to sign off on vote counts;[36]
- count valid twice-perforated votes;[37] and
- correct discrepancies between vote counts at polling stations and aggregated counts.[38]

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34 As discussed in Chapter 9, the Constitutional Court has since invalidated statutory provisions requiring citizens to be registered to vote. Previously a citizen would usually only receive an 'invitation' to vote if they were registered. Citizens can now vote without registration or an invitation, provided that they present their official identity card (*Kartu Tanda Penduduk*, KTP), passport or other form of valid identification.

35 See, for example, the *Pekanbaru Mayoral* (2011, para [3.26.2.3]); *Manado Mayoral* (2010); *South Tangerang* (2010); *Pandeglang Bupati* (2010) election cases.

36 See, for example, the *Minahasa Utara Bupati* (2010); and *South Timor Tengah Bupati* (2008) election cases.

37 See the *Lamongan Bupati* (2010); *Tomohon Mayoral* (2010); and *Surabaya Mayoral* (2010) election cases.

38 See, for example, the *Sintang Bupati election case* (2010).

In other cases, the Court has found that polling or electoral commission officials were involved in more sinister endeavours to help one pair win, including by:

- inflating the vote count of one of the competing candidate pairs;[39]
- sending excessive numbers of extra ballot papers to polling stations, leading to suspicions that they were used to add votes for particular pairs;[40] and
- issuing quick counts favouring one pair well before voting had concluded (*Gresik Bupati Election case*, 2010).

In the *Sintang Bupati Election case* (2010), the Court ordered a revote after accepting that polling officials perforated ballot papers the night before the election and declared the result even before citizens voted.

3.3 *Assessing the Scope of Electoral Process Breaches*

Applying the 'structured, systematic and massive' test required the Court to identify the violation and its scope. The Court did this in many cases, with breaches and their effect on the election result specifically mentioned in its decisions.[41] For example, the Court refused to order fresh elections in money politics cases where the applicant failed to prove who gave and received the money, and how much money changed hands.[42]

However, in other cases the Court did not consider whether the violation was structured, systematic and massive, or whether the violation could have affected the votes obtained by the contesting pairs. The Court's general approach was to set out evidence pointing towards violations and then, without mentioning the scope of the violations, to assert either that they were 'structured, systematic and massive' or rather merely 'incidental, individual and sporadic'.[43]

Some of the Court's money politics cases demonstrate that this approach is problematical. In them, the Court found, often on the basis of testimony from several witnesses, that handouts of cash or goods were distributed. However, the Court did not indicate how many people had received them.

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39 As was proved in the *Morotai Bupati election case* (2011, para [3.15]).

40 Such as in the *South Timor Tengah* (2008) and *Gresik* (2010) bupati election cases.

41 See, for example, the *Tebo Bupati* (2011, para [3.24.6]) and *Kotawaringin Barat Mayoral* (2010) election cases.

42 As in the *Cianjur Bupati Election case* (2011, para [3.26]).

43 For example, in the *Gresik Bupati* (2010); *Surabaya Mayoral* (2010); and *Mandailing Natal Bupati* (2010) election cases.

Determining whether a breach was 'massive' or could have affected the vote count would seem impossible without identifying how many voters were influenced and the proportion they constituted of overall voters. In the *Konawe Selatan case* (2010), for example, the Court accepted that money had been distributed at the official residence of the incumbent Bupati. This claim was substantiated in four affidavits; by one witness at trial who also produced a photograph of himself receiving money at the Bupati's house; and from 'other evidence' that the Court did not specify (*Konawe Selatan case*, 2010, para [3.34]). The incumbents did not attempt to refute this evidence. The Court concluded that money politics had occurred, without determining how much money was paid or received, the number of recipients, or whether recipients had promised to vote for the incumbent in return for the money.

In the *Pekanbaru Mayoral Election case* (2011), the Court again ordered fresh elections without identifying the scope of the violation. The Court accepted that a group from a neighbouring district had travelled to Pekanbaru the night before the poll to vote illegally using false names, but it did not disclose how many people were involved or where they voted – even whether they did in fact vote (*Pekanbaru Mayoral Election case*, 2011, para [3.26.3.3]). The Court also found that the Pekanbaru mayor had used his position to build support for the winners; he had introduced them at official functions and inauguration ceremonies, and in official speeches had urged attendees, including village and neighbourhood association heads, to vote for them. The mayor had 'made decisions or taken action that favoured one of the pairs or had at least allowed his or her officials to be active in the victory of one of the pairs' (*Pekanbaru Mayoral Election case*, 2011, para [3.26.5.3]). However, the Court neither determined how many people attended the meetings nor called witnesses to testify that the meetings influenced their vote. Without this information, it seems very difficult, perhaps impossible, to conclude that these meetings affected enough votes to change the outcome of the election.

3.3.1 Candidacy Cases

As mentioned, the Constitutional Court also heard many candidacy disputes. This primarily involved it assessing whether local election commissions followed the 2004 Regional Government Law's candidacy rules. Most of these cases fell into one of two categories. The first was where a commission allowed candidates to stand even though they did not meet candidacy requirements; the second was where a commission prohibited candidates from standing even though they were, in fact, eligible.

Several candidacy cases were disputes about the way local electoral commissions applied Article 58(f) of the 2004 Regional Government Law. This provision prohibits people who have served a criminal sentence of five years or more from standing for election as the head or deputy head of a regional government. In its first candidacy case – the *South Bengkulu Mayoral Election case* (2008) – the Court ordered a re-election because the local commission had allowed a mayoral candidate, Dirwan Mahmud, to stand even though he had served seven years in prison for murder.

As discussed in Chapter 8, the Court was asked several times to consider the constitutionality of Article 58(f). In a series of cases from 2007, the Court progressively loosened the prohibition, eventually holding, in the *Robertus case* (2009), that Article 58(f) would not prevent people found guilty of a crime from standing for election provided certain conditions were met. These were: publicly and honestly disclosing their previous conviction, five years having passed since the sentence had been served, and the crime not being a repeat offence.

Article 58(f) was again at issue in the *Tebing Tinggi Mayoral Election case* (2010). One of the losing pairs complained that Mohammad Syafri Chap, of the winning pair, had been ineligible to stand because he had been convicted of corruption and sentenced to one year's imprisonment. This was the minimum sentence for the crime, and it had been suspended for 18 months, during which time Chap had stood for mayor.

The Court split five judges to four. The majority[44] decided, following *Robertus* (2009), that Chap fell foul of Article 58(f) because five years had not passed since his criminal punishment ended. He was, therefore, ineligible. The Tebing Tinggi Electoral Commission complained that it could not afford to hold the revote and hundreds rallied in front of the Commission's office (Gunawan, 2010). Nevertheless, the Court ordered a fresh election and disqualified Chap from standing. The minority,[45] on the other hand, appeared unwilling to strictly follow the conditions the Court had imposed in *Robertus* (2009). Even though five years had not passed since completing his criminal punishment, Chap had not been incarcerated and had openly admitted his conviction. Also relevant for the minority was that other candidates had not objected to his candidacy at the time of registration or verification.

The Court has also been regularly called upon to determine whether local electoral commissions have verified whether candidates have the requisite

44 Justices Mahfud, Achmad Sodiki, Muhammad Alim, Arsyad Sanusi, dan Ahmad Fadlil Sumadi.

45 Justices Akil Mochtar, Maria Farida, Hardjono, Hamdan Zoelva.

party support to stand. According to electoral laws, party-nominated candidates require support from a party or coalition that won at least 15% of votes in the most recent local legislative elections.[46] Political parties, whether alone or in a coalition, can support only one candidate in each *Pemilukada*. Independent candidates can stand but must provide various indicia of public support.[47]

Disputes arose when local election commissions disqualified candidate pairs in one of two circumstances. The first was where candidates thought that they did, in fact, have the requisite 'factual' support but the local electoral commission determined that they did not.[48] These cases became complex if a coalition of parties initially supported a candidate, but then one or more of the parties withdrew that support just before the election took place. Predictably, the applicant and the commission usually disagreed about whether this loss of support took the candidate's support below 15%. Nevertheless, the electoral commission needed to verify whether that party in fact withdrew its support for the candidate, and applicants often argued that the commission did not perform this verification.[49] Verifying support can be onerous. For example, in the *Tapanuli Tengah Mayoral Election case* (2011), one pair claimed support from 14 political parties (Hukumonline, 2011a).

The second circumstance was where more than one candidate pair claimed support from the same political party. Given that each party could support only one candidate, the local electoral commission needed to check which of the candidate pairs the party formally supported. It needed to do this through the party's national executive.[50] The commission's task became difficult if a party had split and one side supported one candidate while the other side supported another candidate in the same *Pemilukada*.[51] If the party had split, the commission needed to check with both the national party executive and the Department of Law and Human Rights to determine which pair the party supported.

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46 Article 59(2) of the 2004 Regional Government Law; Government Regulation 6 of 2005 on the Election and Appointment of Regional Heads.

47 The requisite support differs depending on the level or tier of government. See the 2008 Amendment to 2004 Regional Government Law.

48 For cases involving the verification of independent candidates, see *Buton Mayoral* (2011); *Kepulauan Yapen Bupati* (2010); and *Jayapura Mayoral* (2010) election cases.

49 Such as occurred in the *Pati Mayoral election case* (2011).

50 See Article 60 of the 2004 Regional Government Law and Article 61 of Electoral Commission Regulation 13 of 2010.

51 Such as in the *Buton election* (2011) and *Tapanuli Tengah Mayoral* (2011) case.

In cases arising out of these circumstances, the applicant often complained that the commission did not follow these procedures and sought postponement of the election until proper 'verification and clarification' had taken place. Generally speaking, if the applicant created enough doubt about whether the local commission had properly verified a candidate's support, the Court ordered the electoral commission to verify or re-verify. In several cases, such as the *Jayapura* (2011) and *Maluku Tenggara Barat Bupati* (2011) election cases, applicants later claimed that the local commission ignored, or imperfectly implemented, Constitutional Court verification orders. In both cases, however, the Court held that the commission had, in fact, re-verified.

4 2009 Elections

An important question that arose as the Court began hearing disputes arising out of the 2009 legislative and presidential elections was whether the Court would extend its *Pemilukada* jurisprudence to those national elections. The alternative was following the 'Mahkamah Kalkulator' approach it employed to resolve the 2004 legislative and presidential election disputes.

Little has been written about this, though some commentators have concluded that the Court chose the latter approach, employing the 'substantive justice' concept to resolve these disputes (Ali et al., 2012). This conclusion was supported by statements the Court made.[52] For example, in the *Partai Golongan Karya application* (2009, para [3.128]), it declared:

> honest and just elections mean that material truth is the foundation to measure the quality of the elections in order to create substantive justice, which has become the stance of the Court since [the *East Java case* (2008)].

In the *Nias application* (2009), the Court issued a decision that appeared to follow the Court's *Pemilukada* jurisprudence. After reviewing a long list of electoral violations proved by the applicants, the Court held that elections in South Nias had 'not been implemented in accordance with electoral procedures and principles – direct, public, free, secret, honest and just' (*Nias application*, 2009, para [3.13]). Even though the applicants had sought only a recount, the Court

52 And also a former Constitutional Court judge interviewed in Malang, 8 May 2012.

ordered a complete re-election in South Nias for the DPR and provincial and county DPRDs. In the words of the Court:

> The Court cannot stay quiet in the face of a general election that is carried out with clear massive and structured violations. If this is allowed to stand, it means the state has become weak or unable to guard democracy. In addition, if violations such as these are allowed to stand, it will be easy for similar violations to take place in future elections. Therefore, the Court cannot tie itself to only examining and deciding from quantitative perspectives, only recapitulating the vote counts that have been formally stipulated by the KPU. The Court can also order revotes and recounts.
>
> *Nias application*, 2009, para [3.15]

The Court ordered re-elections and recounts – something it did for the first time in *Pemilukada* cases and had refused to do in 2004 – sometimes mentioning 'substantive justice'. Yet it would be inaccurate to conclude that the Court transplanted its *Pemilukada* jurisprudence into its 2009 legislative and presidential election dispute decisions. As we shall see, in 2009 the Court operated primarily as a 'Mahkamah Kalkulator', just as it had in 2004. In fact, the Court explicitly refused to intervene in circumstances similar to those in which it ordered revotes or recounts in *Pemilukada* cases, holding that pursuing the violations was the responsibility of other entities, such as *Panwaslu* or the police.

4.1 *Legislative Elections*

Generally speaking, the Court's approach to disputes arising out of the 2009 legislative elections was very similar to that it had adopted in 2004. That is, the Court confined itself to examining documentary evidence of vote counts and recapitulations. If it detected irregularities, then it would stipulate the correct vote count or recapitulation.[53] For example, in several cases, the Court examined polling station-level tallies (the so-called 'C-1' forms) and found that when recapitulated they had been added up incorrectly.[54]

If presented with documents of doubtful authenticity upon which officials had relied to recapitulate the results, the Court tended to stipulate the correct

53 See, for example, *Partai Persatuan Pembangunan application* (2009, para [3.24]); *Partai Kasih Demokrasi Indonesia application* (2009, para [3.26]); *Partai Bintang Reformasi application* (2009, para [3.77]); and *Partai Golongan Karya application* (2009, para [3.98]).

54 See, for example, *Partai Persatuan Pembangunan application* (2009, para [3.149]; *Partai Amanat Nasional application* (2009, para [3.25]); and *Partai Golongan Karya application* (2009, para [3.276]).

count using authentic documents – or at least the most reliable available to it. For example, in the *Partai Kebangkitan Nasional Ulama application* (2009), the documents adduced by the applicant were preferred because they were properly signed. By contrast, the respondent's data was not. Likewise, the Court preferred the applicant's documentary evidence in the *Partai Penegak Demokrasi Indonesia application* (2009, para [3.11]). The respondent's forms had the KPU's stamp but no signatures, whereas the applicant's had the same stamp and the signature of the polling station head on each page. The Court also tended to uphold applicants' claims if the respondents' forms showed correction fluid or scratched-out data.[55] In several cases, the Court simply stipulated the correct vote count after electoral administrators acknowledged the errors about which the applicants had complained.[56]

As in 2004, the Court rejected claims if the applicants did not specify the 'correct' vote count that they wanted the Court to stipulate, or did not identify the polling stations at which irregularities occurred.[57] The Court also refused to hear challenges that, if upheld, would not have affected the distribution of seats.[58]

4.1.1 Refusal to Intervene

A significant difference exists between the Court's approach in the 2009 legislative election disputes and in the *Pemilukada* cases. In several of the former, the Court acknowledged allegations and breaches but concluded that intervening was beyond its jurisdiction. By contrast, in response to similar claims in *Pemilukada* cases, the Court ordered revotes or recounts.

The Court refused to intervene in numerous 2009 cases, including the following.

- In the *Partai Barisan Nasional application* (2009), the applicant argued that political parties and officials had engaged in money politics. The Court responded: 'as far as the suspicions of money politics are concerned…this

55 See, for example, *Partai Bersatu Atjeh application* (2009); *Partai Gerakan Indonesia Raya application* (2009).

56 See *Partai Aceh application* (2009); *Hanura application* (2009, para 3.55]); *Southeast Sulawesi DPD application* (2009).

57 See *Partai Keadilan Sejahtera application* (2009, para [3.54, 3.65]); *Partai Bintang Reformasi application* (2009, para [3.145]).

58 See *Partai Persatuan Pembangunan application* (2009). Nevertheless, the Court stipulated only very small differences to the vote count in some cases. For example in *Partai Keadilan Sejahtera application* (2009, para [3.61]), the Court found that the applicant had wrongly lost six votes and that another party had erroneously been awarded two additional votes.

does not fall within the jurisdiction of the Court' (*Partai Barisan Nasional application*, 2009, para [3.26]).

- Also in the *Partai Barisan Nasional application* (2009), the Court was presented with evidence that several hundred people had voted more than once. The Court said that 'voting more than once is the responsibility of *Panwas* and the KPU to resolve…' (*Partai Barisan Nasional application*, 2009, para [3.31]).
- In the *Partai Kasih Demokrasi Indonesia application* (2009), the applicants demonstrated that the KPU had left out the name of one of its candidates on the ballot paper and had put down another name instead. When counting and recapitulating the votes, the KPU awarded the votes obtained by the person whose name was erroneously included to the Indonesia Democracy-Lovers' Party (*Partai Kasih Demokrasi Indonesia*) candidate whose name was omitted. The Court refused to intervene, finding this to be an 'administrative breach', not a 'dispute about election results' (*Partai Kasih Demokrasi Indonesia application*, 2009, para [3.32]).
- In the *Partai Keadilan Sejahtera application* (2009), the Court heard evidence that the Aceh Electoral Commission had not released vote counts, had counted votes in private, and had not publicly announced the results of vote recapitulations. The applicants demonstrated that this violated the 2008 General Election Law.[59] However, the Court held that these problems did not fall within its jurisdiction, pointing out that the applicant had not identified any counting errors (*Partai Keadilan Sejahtera application*, 2009, para [3.42]).[60]
- In the *Partai Golongan Karya application* (2009), the applicants demonstrated that the KPU had failed to distribute ballot papers for the DPR election in the East Java XI electoral district. The Court accepted that this was a widespread violation, but held that it was for *Panwaslu* and the police to pursue, not the Court (*Partai Golongan Karya application*, 2009, para [3.69]).

These 2009 cases sit uncomfortably alongside statements made in *East Java* (2008), set out above, in which the Court justified examining electoral violations on grounds that other institutions were not satisfactorily handling them. Ignoring these violations, the Court said there, allowed someone to benefit from their violations and infringements, which was contrary to universal

59 Namely, Articles 223(b), (f) and (g), 187(2), 187(4), 187(6) and 189(2).

60 This decision seems inconsistent with the *Partai Karya Peduli Bangsa application* (2009, p. 444) in which the Court upheld the applicants' request for a recount because the vote counting at the polling station was not conducted transparently, despite the applicant being unable to provide evidence of vote inflation.

principles of law and justice (*East Java case*, 2008, paras [3.25, 3.27]). To the extent that violations were widespread in 2009, the decisions also appear to be inconsistent with the Court's assertion, made in *East Java* (2008), that significant violations of election laws were 'disputes about vote counts', because they affected the final vote count.

4.1.2 Recounts and Revotes

Although the Court 'stipulated the correct count' (*menetapan penghitungan suara*) in most of the 2009 legislative election disputes in which it upheld complaints, the Court ordered two re-elections and six recounts (Surbakti et al., 2011, p. 20), sending two of its own judges to supervise them alongside electoral observers (Hukumonline, 2009b). The Court's willingness to order revotes and recounts appears to have originated from its *Pemilukada* jurisprudence. The Court had ordered no such re-elections and recounts in 2004.

The Court ordered revotes in the *Nias application* (2009) and *Papua DPD* (2009) cases. In *Nias*,[61] the Court accepted that irregularities had marred elections for the national DPR, provincial DPRD and county DPRD in the South Nias electoral district, in North Sumatra. The Court found that votes had not been counted at polling stations, as required by the 2008 General Election Law, but rather had been sent straight to the county-level (*kabupaten*) South Nias KPU. Accordingly, the polling-station level vote count had neither been signed by polling officials nor endorsed by party witnesses at polling stations. There had also been no recapitulation at the sub-district (*kecamatan*) level as required by the Law. Worse, the sub-district KPU took so long to submit its recapitulation that the central KPU ordered the Provincial North Sumatra KPU in Medan to recount the votes cast in South Nias.[62] However, for reasons not disclosed by the Court, 21 boxes of votes were not transported to Medan for the recount. One official estimated that, of about 190,000 votes cast, around 60,000 votes had disappeared (Hukumonline, 2009c).

In a judgment that perhaps more than any other resembled a *Pemilukada* decision, the Court ordered a re-election in the various polling stations affected by these irregularities. It adopted terminology used in many *Pemilukada* cases, stating that the election was not 'direct, public, free, secret, honest and just', and justifying its intervention by declaring that the Court could not 'stay quiet' in the

61 The Court combined several parties as applicants who had applied separately to challenge the results in that district: *Partai Demokrat*, *Partai Republika Nusantara*, *Partai Perjuangan Indonesia Baru*, *Partai Pengusaha dan Pekerja Indonesia*, and the *Partai Kasih Demokrasi Indonesia*.

62 Medan is the provincial capital of North Sumatra.

face of 'massive and structured violations' (*Nias application*, 2009, paras [3.13, 3.15]). In another case challenging the results of the DPD election in the same district, the Court upheld a claim for a recount using the same discourse, holding that 'fundamentally, massive and structured violations must be treated the same' (*North Sumatra application*, 2009, para [3.2]). Yet while these violations were particularly serious, having potential to affect the outcome, this decision appears inconsistent with the 2009 cases, discussed above, in which the Court refused to intervene in what it described as violations in 'electoral administration'.

The second case in 2009 where the Court ordered a re-election was the *Papua DPD case* (2009). This case is discussed in Chapter 7 in the context of the *noken* voting system. Under one variation of this system, all voters in an electoral district reach a 'consensus' to vote for the same candidate. As mentioned, the Court endorsed this tradition, despite its undemocratic nature. However, the Court found other faults with the way the elections were conducted, identifying various 'structured' and 'massive' violations that had occurred. In particular, for reasons the Court did not specify, DPD elections were simply not held in 37 districts. The Court ordered re-elections in those 37 districts and recounts in 14 others where the results were disputed (Jakarta Post, 2009).

As mentioned, the Court ordered recounts in six cases arising out of the 2009 elections. In these cases, the correctness of the vote counts or recapitulations were disputed, but the Court was either presented with no convincing evidence or found it difficult to decide between contradictory evidence of similar weight. In one case, for example, the Court was presented with inconsistent vote counts from ten polling stations and ordered ballot boxes to be opened for a recount (*Partai Bulan Bintang application*, 2009, para [3.9.7.8]). In similar circumstances, the Court ordered that official polling station counts be re-tallied in 16 sub-districts (*Hanura application*, 2009).[63] In two further cases, neither the applicant nor the KPU could present authentic evidence of the correct count in 24 polling stations.[64] The Court decided that it had no alternative but to order a recount.

4.2 *Presidential Elections*

After losing in the first round of the 2009 presidential election to the Susilo Bambang Yudhoyono-Boediono pair, the Jusuf Kalla-Wiranto and Megawati Soekarnoputri-Prabowo Subianto pairs challenged the result before the

63 For a similar case, see *Partai Demokrasi Indonesia Perjuangan application* (2009, para [3.23]).

64 *Partai Karya Peduli Bangsa application* (2009, para [3.5.18.3]); *Partai Bintang Reformasi application* (2009, para [3.101]).

Constitutional Court. They made four main arguments, all of which the Court rejected.

First, they claimed that 'international interference' had marred the result because the International Foundation for Electoral Systems (IFES) had helped administer the election. For the Court, this was mere 'suspicion' unsupported by evidence (*Kalla-Wiranto and Soekarnoputri-Subianto application*, 2009, para [3.34]). Second, the applicants alleged counting and tabulation errors. The Court determined that the documents produced to demonstrate these errors were not official and, therefore, had no evidentiary value (*Kalla-Wiranto and Soekarnoputri-Subianto application*, 2009, para [3.59]).

Third, the applicants complained that the KPU had improperly combined polling stations. The KPU had merged around 70,000 of the approximately 500,000 polling stations used for legislative elections, meaning fewer stations were employed for the presidential elections. The Kalla-Wiranto pair claimed to have lost 25 million votes from this and the Soekarnoputri-Prabowo pair 35 million. However, the applicants provided no evidence that they had, in fact, lost votes. In any event, the Court observed, reducing the number of polling stations was permitted by statute. The 2008 General Election Law allowed each polling station to serve a maximum of 500 people, whereas the 2008 Presidential Election Law allowed each polling station to accommodate up to 800 (*Kalla-Wiranto and Soekarnoputri-Subianto application*, 2009, para [3.34]).

Finally, the applicants complained about numerous irregularities in the electoral roll, including double entries enabling citizens to vote more than once. The Court accepted that the electoral roll was error-ridden, but emphasised that external scrutiny made tampering with it difficult. Further, the mere fact that someone was listed twice on the roll did not mean that they voted more than once. To win this argument, the applicants needed to demonstrate that people had in fact done this.

Nevertheless, despite rejecting the application, the Court acknowledged, as it did in 2004, that the 2009 presidential elections had been imperfectly administered and that many 'weaknesses', 'shortcomings' and even 'violations' of electoral laws had taken place (*Kalla-Wiranto and Soekarnoputri-Subianto application*, 2009, para [3.54]). This did not, however, warrant recounting or fresh elections. In coming to this conclusion, the Court again used terminology employed in *Pemilukada* cases. There were no 'electoral violations that could be categorised as…structured, systematic and massive, that caused the election to lose its validity' (*Kalla-Wiranto and Soekarnoputri-Subianto application*, 2009, para [3.54]). The Court also accepted that the KPU had made various procedural errors when administering the election, but these were 'tolerable

breaches of an administrative nature' (*Kalla-Wiranto and Soekarnoputri-Subianto application*, 2009, para [3.70]).

5 2014 Elections

5.1 *Legislative Elections*

As mentioned, the Court heard over 900 disputes lodged by almost all political parties that had competed in the 2014 legislative elections (Anjarsari, 2014).[65] As in previous legislative election disputes, the Court imposed tight time limits for lodging applications. Applicants had to submit their claims within 72 hours of the General Election Commission announcing the election results – at 11.51pm on 9 May (Yunus, 2014). The Court then gave applicants three days to remedy any errors in their applications (Junaidi and Della-Giacoma, 2014a). The Court gave itself 14 days to decide these cases.

The Court sided with applicants in a relatively small proportion of cases. Of the 903 cases, the Court agreed with claims put forward by the applicants in only 23, or 2.5%, of them. Even in these cases, the Court rarely upheld all of the applicants' claims. The Court refused to hear over one-third of applications for breaching time limits and other rules,[66] and the applicants withdrew in 26 cases. Over half of applications were rejected because applicants provided insufficient evidence to support their arguments.

In 2004 and 2009 the Court heard its electoral dispute cases 'by party' – that is, it grouped together all of the complaints made by a single party about alleged irregularities across all the electoral districts it contested and decided them in a single judgment. By contrast, the 2014 cases were heard 'by electoral district'. That is, the Court heard complaints by all parties about the election in a particular district and issued a single judgment concerning that district. Although the Court has, to my knowledge, not explained changing its approach, it was probably keen to avoid issuing contradictory decisions – as occurred in 2009 when different parties complained about the result in the same electoral district. This was possible because the Court usually splits into three panels, each with three judges, to hear these cases, so more than one panel could decide disputes arising out of a single electoral district. For example, in the

65 These cases were lodged by 12 national and 2 local Aceh political parties and 34 DPD candidates from 32 provinces. Of these, 186 disputes concerned the national parliamentary election, 117 concerned provincial parliamentary elections, 321 concerned city or county elections and 34 were about DPD elections (Junaidi and Ramadhanil, 2014, p. 12).

66 The Court refused to hear 312 cases for these reasons (Anjarsari, 2014).

Partai Persatuan Pembangunan application (2009), the Court issued a decision stipulating the correct count in Tulang Bawan county, Lampung, but in the *Hanura application* (2009), issued on the same day, a different panel ordered a recount in that county.

As in previous electoral disputes, many applicants claimed that vote tallies were deliberately manipulated – usually through conspiracy between their competitors and electoral officials (Junaidi and Ramadhanil, 2014, p. 24).[67] A common alleged *modus operandi* was adding a number in front of the correct vote count during aggregation. So, for example, a candidate who obtained 5 votes in a particular electoral district would receive 15 votes if the number '1' was added to the '5' (Junaidi and Ramadhanil, 2014, p. 25). Many applicants also argued that errors were made during counting or tallying, usually because they took place late at night after a long day of voting and counting, when officials and party witnesses were fatigued.[68]

A new category of disputes to emerge in 2014 was 'internal' party disputes. Fourteen parties lodged 118 such disputes with the Court (Junaidi and Della-Giacoma, 2014b).[69] In them, individual candidates challenged the vote counts of other candidates from their *own* party on the same grounds used to challenge the counts of other parties. These internal disputes result directly from the Court's decision in *Open List* (2008), discussed in Chapter 8. There, the Court required parties to allocate any seats they obtained to their candidates strictly according to the number of votes each obtained. Previously, political parties could choose which of their candidates would receive seats, by ranking their preferences on a candidate list. This decision made competition for seats almost as intense between candidates from the same party as between candidates from different parties.[70]

As in previous years, the Court rejected most of these applications for lack of evidence. The Court was rarely satisfied with either document or witness testimony. Most winning applicants produced both.[71] Applicants who merely

67 These types of allegations were made in around 423 cases (Junaidi and Ramadhanil, 2014, p. 14).

68 Applicants claimed that errors had affected the vote count in around 206 cases (Junaidi and Ramadhanil, 2014, p. 28).

69 Golkar lodged the most, with 48 cases (Junaidi and Ramadhanil, 2014, p. 27).

70 To allow these cases to proceed, the Court changed its standing rules. In previous elections, the Court had only permitted parties to challenge the results. For 2014, however, the Court also allowed individual candidates from political parties to bring claims.

71 For example, in the *North Maluku application* (2014), the Court cited the applicants' failure to produce documentary evidence to support witness testimony as a basis for rejecting the application.

sought to cast doubt on the propriety of the election or counting processes almost never succeeded. They needed to provide estimations of votes lost, backed by convincing evidence.

As mentioned, the Court upheld claims in only 23 applications. In 13, it ordered a recount (*penghitungan ulang*). In the remaining ten, the Court replaced the KPU's formal count with its own. Like in 2004 and 2009, the Court was usually faced with competing versions of vote counts and tallies from contestants in a particular district and the electoral commission administering that district (Julie, 2014). As in previous years, the Court often compared contradictory documents to determine which, if any, were 'authentic' or official. To this end, the Court checked whether the documents were signed by witnesses and officials at the polling station, and whether numbers on tally forms were crossed out or correction fluid had been used. Sometimes, the Court also checked whether the document was 'official' – that is, whether it had a hologram embedded (which was authentic) or affixed (which was not authentic) – and considered whether *Bawaslu* or *Pawaslu* had, in light of the apparent discrepancies, recommended that the electoral commission order a recount.[72] If the Court thought that the count on one form was correct, but the electoral commission aggregated votes using another form, the Court usually replaced the electoral commission's aggregated vote count with its own, using what it determined as the correct form (*Aceh application* (2014); *Lampung application* (2014)).

In several cases the Court was unable to determine which of the forms presented to it were authentic. Following patterns established in 2009, the Court sometimes ordered a recount of ballot papers in the interests of 'certainty' and maintaining trust in the elections.[73] The Court ordered recounts in other rare circumstances, such as in the *Southeast Sulawesi application* (2014). Here, the Court heard compelling evidence that polling officials had manipulated tally sheets, with many numbers crossed out and parts of forms left blank, leading to uncertainty about the result. The Court also held that election officials had breached their Ethics Code and the fundamental principles of elections – that they be direct, free, secret, honest and just (Erawan, 2014, p. 29).[74]

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72 *Manado application* (2014); *North Maluku application* (2014); *Southeast Sulawesi application* (2014); and the *Maluku application* (2014), the only DPD application to be accepted out of 32 applications.

73 *North Maluku application* (2014); *West Java application* (2014); and *North Sumatra application* (2014).

74 Though, as mentioned, the Court lacks power to punish the officials.

However, conspicuously absent from the Court's decisions in 2014 were the 'structured, systematic and massive' test and the ordering of re-elections, even though many applicants framed their arguments to meet this test and sought re-elections. In the conclusion to this Chapter, I argue that this was likely a calculated strategy and explain why the Court might have chosen it.

5.2 *Presidential Elections*

In the *Prabowo challenge* (2014), presidential candidate Prabowo Subianto and his vice-presidential running mate, Hatta Rajasa, alleged that many electoral violations took place before, during and after the 2014 presidential election. They made many arguments that had succeeded in previous *Pemilukada* disputes before the Constitutional Court. These included that the KPU made counting mistakes and logistical errors, including using ink that was not indelible; that unregistered voters had voted and that some voters had voted more than once; that various officials in Kalimantan and Central Java had advocated for their competitors; and that their opponents had engaged in money politics (Faiz, 2014).

The Court rejected all of these claims, holding that the Prabowo pair had provided insufficient evidence to demonstrate that violations were structured, systematic and massive. The Court accepted that some irregularities may have occurred, but found that, even if they had, they would not have changed the result (*Prabowo challenge*, 2014, para [3.31]). As for money politics, for example, the applicants had been unable to identify distributors and recipients. They had also not established when or where transfers took place and how much was transferred (*Prabowo challenge*, 2014, para [3.30]). As for the applicant's allegation about ink, the applicant had not even provided a sample for the Court (*Prabowo challenge*, 2014, para [3.29]).

6 Evidence in Electoral Disputes

Legal cases the world over turn on the evidence that can be produced by the parties to the dispute – the person making the allegation (whether the prosecutor in criminal cases, the plaintiff in civil cases, or the applicant in constitutional cases), the person responding to those allegations (the respondent or defendant), and any other party (including related parties or *pihak terkait*). In many countries – particularly those following the civil law tradition – judges will actively seek information and call their own witnesses, particularly if the evidence adduced by the parties is unclear, incomplete or requires verification.

For the most part, electoral dispute cases in the Indonesian Constitutional Court are no different. Applicants generally bear the onus of convincing the Court that the violations they allege took place. Applicants, respondents and related parties must substantiate their claims with valid evidence such as documents, witness testimony, videos, photographs or audio recordings. Unlike a common law system, the Indonesian system is not purely adversarial. The Court can, and regularly does, call witnesses, including experts in electoral and constitutional law, when it needs further information to decide cases. This the Court does in an endeavour to be 'convinced' that its decision is correct.

Following these practices, in some cases the Court has actively examined parties' arguments. The Court has even made findings and orders based on facts that the parties did not mention in their applications (Widjojanto, 2009).

However, in other cases, the Court has employed practices more closely resembling the adversarial system. The Court has used evidence produced by applicants as a basis to stipulate new vote counts, or even order recounts or revotes, simply because that evidence was not refuted by other contestants or the KPU in written submissions or at trial. This it has done in *Pemilukada* cases,[75] and legislative and presidential election disputes in 2004[76] and 2009,[77] sometimes without ostensibly verifying the authenticity of the applicant's evidence.[78] These cases seem inconsistent with those in which the Court has been more active. At best, this inconsistency gives an air of arbitrariness to the Court's decision-making; at worst, it leaves the impression of bias.

On a positive note, the Court did not employ this 'proved unless refuted' presumption in 2014 election cases. Rather, the Court consistently required applicants to more actively prove their claims by providing convincing evidence. (However, as we shall see, even in these 2014 cases, the way evidence

75 Such as in the *Tapanuli Tengah Mayoral* (2011, para [3.23.3]); *Konawe selatan* (2010, para [3.34]); *Sintang Bupati* (2010); and *Gresik Bupati* (2010, para [3.19.4]) election cases.

76 See, for example, *Partai Kebangkitan Bangsa application* (2004); *Partai Keadilan Sejahtera application* (2004); *Partai Demokrasi Indonesia Perjuangan application* (2004).

77 *Partai Barisan Nasional application* (2009, para [3.33]); *Partai Persatuan Pembangunan application* (2009); *Partai Kebangkitan Bangsa application* (2009); *Partai Karya Peduli Bangsa application* (2009, para [3.5.4.4, 3.5.17.5]); *Partai Persatuan Daerah application* (2009, para [3.40, 3.42]); *Partai Amanat Nasional application* (2009, paras [3.37, 3.38, 3.45]); *Partai Demokrasi Indonesia Perjuangan application* (2009, para [3.27]); *Hanura application* (2009, para [3.50]).

78 In the *Partai Kebangkitan Bangsa application* (2009), the Court did not even specify the document adduced by the applicant upon which the Court relied to override the KPU's vote count.

was handled gave applicants and respondents little, if any, opportunity to respond to each other's evidence.)

6.1 East Java Case (*2008*)

An extreme example of the Court accepting the applicant's evidence in the absence of submissions from the respondent is the *East Java case* (2008) – the decision in which the Court began developing its 'substantive justice' jurisprudence in *Pemilukada* cases. There, the Court appeared to provide no opportunity for the respondent to counter evidence put forward by the applicant. Yet the Court based its decision on that evidence.

The formal proceedings had closed. All submissions had been made and witnesses heard. All that remained to dispose the case was for the judges to deliberate and write their decision, a process which can take several weeks or months. But it was at this point – *after* the hearings had concluded – that the pivotal evidence in *East Java* about the 'contract' and the notarised admissions mentioned above was lodged with the Court. None of this evidence appears in the transcript of proceedings published on the Court's website. This means that neither the respondents nor the related parties had the chance to respond to the evidence, including by casting doubt on the 'contract' or the notarised document. The Court simply accepted the contract and admissions to bolster the applicant's claims, which the Court had noted in it is decision were not initially accompanied by sufficient evidence (*East Java case*, 2008, para [3.33]). The Court then used that evidence to invalidate the elections in the places in which the contract had applied and ordered fresh elections there.

The contract and the notarised admissions should, of course, have been adduced during the proceedings proper so that the related party and the respondent could counter them or challenge their veracity. After all, a primary purpose of judicial proceedings is to allow parties to scrutinise each other's evidence. The respondent, for example, might have demanded that the notary and the person making the admission, Haji Ali, be called to testify and be cross-examined. A pertinent line of enquiry might have been why Mr Ali admitted his wrongdoing before a notary. There may have been an acceptable explanation for this; but in its absence, one is left to speculate about whether the witness testimony was credible. As for the contract, the Court should have tested its authenticity to ensure that it was not fabricated by the applicant; it should also have checked whether village heads had 'complied' with the alleged contract and received money under it.

Critically, the Court did not, in its published reasons, mention that the evidence was submitted to it after the 'trial', let alone explain why it allowed the

applicants to submit it. Again, one is left to speculate whether this indicates impropriety by the Court – permitting the applicant to produce incontestable winning evidence at this stage, and then accepting that evidence, appears to show bias in favour of the applicants. At the very least it demonstrates a lack of concern for transparency.

6.2 *Reliance on Witness Testimony*

As mentioned, applicants usually substantiate allegations with documentary evidence, such as ballot papers, vote counts and aggregated tallies. However, often little or no relevant documentary evidence is available, especially if perpetrators cover their tracks. Many cases have, therefore, hinged on the testimony of citizens or officials who claim to have directly seen a breach or even admitted to being involved in one.[79] As the Court's reliance on witness testimony has increased, so too have the number of witnesses parties call to support their arguments, at least in *Pemilukada* cases. In the *Merauke Bupati Election case* (2010), for example, 58 witnesses testified before the Court.[80]

Witness testimony is problematic in the Indonesian context, however, because it leads to perceptions that candidates, and their political parties, are involved in 'witness-buying'. If electoral money politics is as widespread as is commonly claimed, then bribing or paying off witnesses to help build one's case is unlikely to be beyond most parties and candidates.

The Court has done little to address these inherent problems of witness credibility. It has not, for example, developed a systematic body of principles or practices to help determine whether evidence, particularly witness testimony, is reliable and can, therefore, be used to assess whether a breach has occurred. Only rarely has the Court cast doubt on the credibility of particular witnesses. And when it has, it has not explained why a witness lacked credibility,[81] or why it has based its credibility assessment solely on whether the testimony was consistent with that of other witnesses.[82] One former Constitutional Court judge, Harjono, said to the media that witness testimony

79 For example, witnesses admitted to illegally voting in the *Pekanbaru Mayoral election case* (2011, para [3.26.3.3]).

80 In the *South Tangerang Mayoral election case* (2010) 31 witnesses; *Surabaya Mayoral election case* (2010), 40; *Bandar Lampung Kabupaten election case* (2010), 35; *Medan Mayoral election case* (2010), 33; *South Nias Kabupaten election case* (2011), 28.

81 See the *Manado Mayoral* (2010) and *Konawe Utara* (2010) election cases.

82 Many are heard by teleconference, which surely makes assessing whether a witness is being truthful more difficult and can hinder effective cross-examination.

given during Constitutional Court hearings is the 'responsibility' of the witness and pursuing perjury is a police matter. He said that the Court would not waste its energy deciding whether witnesses were being truthful (Sinaga, 2013).

An example of the Court's problematic handling of witness testimony is provided in the *Gorontalo Governor Election case* (2008). The Court reduced the winners' vote count by four votes, relying solely upon the testimony of four witnesses who admitted to voting illegally (Hukumonline, 2008a). The Court rejected the testimony of seven further witnesses called by the applicants, claiming that their testimony contradicted the testimony of others and was hearsay (that is, not personally experienced by the witness, but rather based on an explanation given to them by another person) (Hukumonline, 2008a). Remarkably, the Court also held that some of these seven witnesses could not be considered 'honest', because they had admitted to taking money but had not then voted for the candidate who gave it to them (*Gorontalo Governor Election case*, 2008, para [3.21]).

Another case that illustrates problems with the Court's reliance on witness testimony and the apparent reluctance to critically assess it was the *South Bengkulu case* (2008). The Court decided that the South Bengkulu election should be repeated without one of the successful candidates, Dirwan Mahmud. This was because, according to the Court, Mahmud should not have stood for election because he had been convicted of a crime punishable by a maximum penalty of five years or more.

The case turned largely on whether Mahmud had, in fact, served a seven-year prison sentence. Mahmud argued that he had not. When candidates were applying to stand, the applicant informed the South Bengkulu Electoral Commission about Mahmud's conviction. The Commission sought clarification from the court that allegedly convicted him and the police said to have investigated him, but could find no record. Given the lack of documentary evidence, the applicant called several witnesses, including prisoners who testified that they had served with Mahmud, and prison officials who said that they recognised Mahmud as a prisoner. These witnesses explained that they knew Mahmud by a different name: Roy Irawan bin Mahmud Amran. The Head of Cipinang prison, where Mahmud had allegedly been held, testified that records for the relevant period had been destroyed in a fire at the jail, but that the East Jakarta District Court had in 1985 convicted a person named Roy Irawan bin Mahmud Amran of the murder of an Agriculture Department official and sentenced him to prison until 1993 (*South Bengkulu case*, 2008, para [3.23.6]). The Court accepted the witness testimony, largely because Mahmud and the South Bengkulu Election Commission could not refute it (*South Bengkulu case*, 2008, para [3.23.6]). According to the Court, then, Mahmud

was 'none other than Roy Irawan bin Mahmud Amran' (*South Bengkulu case*, 2008, para [3.23.7]).

The Court did not explain why it relied upon witness testimony in this case. It could have inferred from the lack of documentary evidence held by the police who allegedly investigated and the court that allegedly convicted Mahmud, that he had not, in fact, been investigated or convicted. Surely if Mahmud had committed the crime, the respondent or the Court could have called evidence from one of the police officers who investigated him or the judges who convicted him. The alternative – relying on the testimony of prison officials and even prisoners – was hardly a credible option.

6.3 *Procedural and Evidentiary Hurdles*

As mentioned, the Court and commentators have traditionally explained the relatively low success rate in electoral disputes as due, at least in part, to applicants failing to provide convincing evidence to support their claims. That applicants find providing such evidence difficult is hardly surprising. Parties have only 72 hours to submit their challenges to the Court, running from the moment when the KPU formally announces the election result (see Article 106(1) of the 2004 Regional Government Law). The Court enforces this deadline strictly.[83] But the deadline leaves parties – particularly those submitting applications from regional areas, far from Jakarta – with very little time to prepare.[84] They must not only prepare their legal arguments but also compile evidence. Though some applicants anticipating adverse electoral results might begin preparing their applications well before the KPU announces the results, many are unable to make their arguments before obtaining final official KPU figures. Undoubtedly some applicants would have put forward more convincing arguments based on stronger evidence had they had more time to collect the evidence and prepare their applications.

For the 2014 elections at least, the Court also prohibited applicants from calling more than three witnesses for each application, regardless of how many polling stations were the subject of that application. This left parties unable to effectively prove many of the allegations they made, or would have liked to have made, in their applications. Applicants were, for example, unable to call

83 Indeed, the Court refused to hear the *Partai Persatuan Demokrasi Kebangsaan application* (2004) for being submitted five minutes after the deadline.

84 Though the Court usually permits applications to be lodged by fax or email.

witnesses to testify about alleged improprieties in four or more polling stations in any one case.

The Court must decide DPR, DPRD, and DPD election disputes within 30 days, and *Pemilukada* and presidential election disputes within 14 days.[85] These deadlines appear to require the Court to compromise its processes and perhaps even the quality of its decision-making. As for processes, most of the evidence provided by applicants in 2014 was examined outside of the courtroom by the Court's registrar, with very little involvement by the parties to the dispute themselves, let alone the Court's judges. Presumably, these evidentiary matters were delegated to the registrar because the Court's caseload prevented it from examining documents and questioning witnesses itself. The Court appears sometimes to have adopted the registrar's assessment of the evidence with no opportunity for the parties to contest the evidence put forward by other parties to the same dispute, or to clarify any of their own evidence (Junaidi and Ramadhanil, 2014, p. 38). This is a significant shortcoming. One of the main purposes of court hearings is for judges to examine all of the evidence – documentary and oral – and to interrogate it where necessary. Only once the Court has assessed the evidence itself can it issue an informed decision.

These tight time frames also leave judges and court staff with little time to produce decisions. To handle the 2014 disputes within the deadline, judges were divided into three panels, each with three judges and responsible for handling disputes arising out of one-third of Indonesia's 33 provinces (Junaidi and Della-Giacoma, 2014a).[86] However, handling 903 cases was a massive task for these three panels, requiring each of them to decide, on average, over 10 cases per day, often sitting well into the night. Perhaps partly for this reason, the Court's opinions were relatively slim. (The case files themselves, available on the Court's website, often run to more than 100 pages. However, the bulk of the file comprises party submissions, apparently copied into the Court's decision.)

There are significant advantages in electoral disputes being resolved quickly. By meeting tight deadlines, the Court ensures that the wheels of government do not grind to a halt. It prevents extended periods of uncertainty over the results and the anxieties this might cause parties and citizens. While deciding cases quickly appears to have required compromises – including to the quality

85 Article 78 of the 2003 Constitutional Court Law and Article 106(4) of the 2004 Regional Government Law.

86 Though judges were not allocated disputes arising out of provinces from which they originated, to avoid bias or perceptions of bias (Sahbani, 2014a).

both of the evidence and perhaps even the Court's decision-making – the Court's decisions have been largely respected. With some exceptions, the many parties that have lost before the Court have not publicly challenged the legitimacy of the Court's decisions or its processes for resolving disputes. If resolving these disputes quickly and decisively is the primary objective, the Court meets it with aplomb.

7 The End of *Pemilukada* in the Constitutional Court

Like the West Java High Court in the *Depok case*, the Constitutional Court has been commonly criticised for refusing to limit itself to count-checking (Widjojanto, 2009). These criticisms led to regular calls for the national parliament to return jurisdiction over *Pemilukada* disputes to the Supreme Court, or to establish a network of special-purpose election courts to hear them. Indeed, the Constitutional Court came close to losing its *Pemilukada* jurisdiction in 2011. During the deliberations of a parliamentary working group established to consider amendments to the 2003 Constitutional Court Law, then-Justice Minister Patrialis Akbar, who would later serve on the Court himself, criticised the Court for 'going too far' and called for its *Pemilukada* jurisdiction to be removed. His argument almost won the day: the Chairperson of the working group observed that most of the group supported Akbar's suggestions (DPR, 2011b). In fact, the group even drafted a provision returning jurisdiction to the Supreme Court and giving the Constitutional Court one year to resolve the *Pemilukada* disputes already lodged with it. The Constitutional Court itself supported the transfer, anticipating a reduced caseload (DPR, 2011c). However, the idea was ultimately voted down in the Legislative Body (DPR, 2011a).

For its part, the Supreme Court has repeatedly declared that, given its current workload, it does not want jurisdiction over *Pemilukada* disputes to be returned to it, or even to a new court of disputed returns under it. It has also rejected handing over decisions to provincial high courts, fearing that they might be 'too close' to the disputes and hence susceptible to manipulation by political parties. Instead, the Supreme Court prefers the establishment of an ad hoc institution, separate from the existing judiciary, to handle these disputes as they arise (Hukumonline, 2010, 2014f). Nevertheless, by early 2014 all factions of the national parliament had reportedly agreed that regional elections disputes should be handled by provincial high courts (Wardy, 2014).

However, before parliament could act, the Court itself issued a six-to-three-judge decision in which it declared that it did not, in fact, have jurisdiction to decide *Pemilukada* disputes, despite having already decided several hundred of them. This was the *Pemilukada Jurisdiction case* (2014), handed down in May 2014. The application was brought by students groups who challenged the constitutionality of Article 236C of the 2008 Amendment to the 2004 Regional Government Law – the provision under which jurisdiction to decide *Pemilukada* disputes had been transferred from the Supreme Court to the Constitutional Court.[87] They argued that the Constitutional Court only had jurisdiction to decide disputes arising out of 'general elections' (*pemilihan umum*) under Article 24C(1) of the Constitution – the provision that establishes the Court's jurisdiction. Article 22E(2) of the Constitution states that 'General Elections are held to elect members of the DPR, DPD, the President and Vice-President, and DPRDs'. Article 22E(2) does not mention *Pemilukada*. For the applicants, this meant that the Court was precluded from handling *Pemilukada* disputes.

The majority agreed that *Pemilukada* did not fall within the 'regime' (*rezim*) of 'general elections', giving three reasons. First, as the applicants had emphasised, *Pemilukada* were not specifically mentioned in Article 22E. More broadly, they also did not 'fit' within the description of 'general elections' contained in Article 22E. They were not 'elections held every five years to choose members of the DPR, DPD, DPRD and the president/vice-president'.

Second, the 'original intent' of the Constitution's drafters was that *Pemilukada* were not 'general elections'. This the majority demonstrated by referring to the majority decision in the *Simultaneous Elections case* (2013), discussed in Chapter 9. That decision had included statements made by Slamet Effendy in an MPR working group discussing constitutional amendments. Effendy indicated that 'general elections' did not include *Pemilukada* (*Pemilukada Jurisdiction case*, 2014, p. 59).

The third reason was that the Court had decided, in the *MK Perpu case* (2014), that it must rigidly delineate the relative constitutional jurisdictions of state institutions. This was to ensure that lawmakers did not usurp the role of the Constitution's drafters (*MK Perpu case*, 2014, para [3.20]). For the Court, Article 24C of the Constitution established its jurisdiction 'limitatively' and lawmakers could not, therefore, add the resolution of *Pemilukada* disputes to this jurisdiction.

87 The Forum for the Study of Law and Constitution, Executive Board of Law Students of Esa Unggul University and the Jakarta Law Students' Movement.

Accordingly, the majority upheld the challenge. Nevertheless, citing the need to maintain legal certainty and avoid legal lacunae, the majority declared that the Court would continue deciding *Pemilukada* cases until the national parliament transferred jurisdiction over these disputes to another entity. The Court did not suggest who that entity should be.

Pre-empting concerns about the *Pemilukada* disputes it had already handled, the majority declared that they remained valid, giving the following reason. Under Article 47 of the 2003 Constitutional Court Law, decisions come into force when read in open court. The majority continued:

> …statutes that are validly enacted, based on the principle of '*presumptio iustitia causa*', must be declared correct, valid and in force, provided that they are not revoked by their creators or declared to have no binding force by the Constitutional Court. The same goes for all decisions that have been issued or action that has been taken based on a valid law – they must be declared valid until revoked or invalidated by an official or institution with authority to do so.
>
> *Pemilukada Jurisdiction case*, 2014, para [3.13]

The majority's decision is not convincing for various reasons, some of which the dissenting judges mentioned. The three dissenting judges issued separate opinions,[88] but all three emphasised that the Constitution did not prohibit lawmakers giving the Constitutional Court jurisdiction to resolve *Pemilukada* disputes. Requiring the Court to perform this function was a matter of 'opened legal policy' for the legislature.[89] Justice Hidayat added that the Court should not always resort to the 'original intent' of constitutional drafters for at least two reasons (*Pemilukada Jurisdiction case*, 2014, pp. 66–67). First, distilling an original intent from various opinions voiced during constitutional debates where many perspectives were aired was difficult, if not impossible. Second, the Court should not always seek to establish the original intent of constitutional provisions. Rather, the Court should interpret the Constitution as a 'living' document, able to meet modern challenges.

There is much to commend Justice Hidayat's views about original intent. As mentioned in Chapter 9, the Court has always chosen statements made in constitutional debates that fit its decisions. It has never set out competing

88 Justices Arief Hidayat, Anwar Usman and Ahmad Fadlil Sumadi.

89 This, the minority held, had been decided in the *Direct Pemilukada elections* case (2004).

statements made during debates, much less explained why it preferred one view over another.

Justice Usman also made compelling arguments in dissent, stating that:

> If the Constitutional Court wanted to declare itself lacking jurisdiction to resolve Pemilukada disputes, it should have done so the first time it received an application to hear such a dispute in 2008.
>
> *Pemilukada Jurisdiction case*, 2014, p. 72

The majority's response to this point had been declaring that, when hearing *Pemilukada* cases, the Court was performing its obligations under statutes that it had presumed were valid. No parties had challenged the constitutionality of these obligations prior to the present case. This explanation is unconvincing, however, particularly in light of some of the Court's previous *ultra petita* decisions discussed in earlier chapters. In those cases, the Court invalidated statutory provisions that applicants did not directly challenge.

The Court's declaration that its decisions in previous *Pemilukada* disputes remained valid is consistent with the cases, discussed in Chapter 5, where it held that its decisions operate prospectively. However, this rationale fails to explain its decision to keep hearing *Pemilukada* disputes until the legislature transfers jurisdiction to another body. Indeed, while the Court justified its previous decisions in the interests of legal certainty, the Court did not seek to justify the constitutionality of its continuing to resolve *Pemilukada* disputes, albeit temporarily. If resolving *Pemilukada* disputes is unconstitutional, the Court should not continue doing so, at least without providing a reason.

The strangeness of this decision has spurred speculation that the majority was motivated by non-legal factors. As mentioned, when the Court was deciding the case, parliament was on the verge of taking *Pemilukada* disputes away from it. (And, as we shall see, this expectation was borne out soon thereafter.) Given the Court's concern to appear in control its own fate, discussed in earlier chapters, did the majority jump before being pushed? In any event, the Court had long complained that *Pemilukada* cases bogged it down and diverted attention from its primary function: constitutional review. And given that former Chief Justice Akil Mochtar was found guilty of receiving a bribe to fix *Pemilukada* disputes, the Court may have wished to avoid future responsibility for these cases, or at least to disassociate itself from them.

Nevertheless, the Court's 'amputation' (Ikhbal, 2014) of *Pemilukada* from its jurisdiction is, in my view, unfortunate. The alternatives – the High Court

and Supreme Court, or special-purpose election courts (which would almost inevitably work under the guidance of the Supreme Court (Hukumonline, 2009a)) – are unlikely to provide more reliable decisions than has the Constitutional Court, despite their various shortcomings, discussed in this Chapter. After all, as mentioned, it was perceived impropriety or incompetence in other courts that led to the transfer of jurisdiction to the Constitutional Court in the first place.

CHAPTER 11

Conclusions

The Constitutional Court has established itself as a hardworking and credible institution in which important public law matters are aired and decided, usually conclusively. Though established within a highly dysfunctional legal system with almost no history of judicial professionalism, the Court is largely respected by government and citizens. Much of this success can be attributed to the dedication and skill of founding Chief Justice, Jimly Asshiddiqie. The Court has continued to thrive under two subsequent Chief Justices – Mahfud MD and Hamdan Zoelva.

The Court has faced numerous challenges from without and within. The legislature and president have, for example, attempted to rein in the Court and change the processes by which alleged impropriety within the Court is handled. The Court itself has limited its own decision-making in some ways, and has radically expanded it in others. It has also issued many legally inexplicably and inconsistent decisions – raising questions about, at best, its competence or, at worst, its impartiality. Yet for this the Court has been rarely criticised. Perhaps its most significant setback was self-inflicted: the arrest, conviction and life-imprisonment of former Chief Justice Akil Mochtar for corruption. This incident brought the Court under significant criticism and scrutiny, undermining its credibility and even bringing some of its previous decisions into question. However, by late 2014, the Court appeared to have restored much of this credibility, particularly by conclusively resolving disputes arising out of the 2014 legislative and presidential elections.

Despite these shortcomings and setbacks, the Court has issued many important decisions that have shaped Indonesia's democratic system, most notably its electoral procedures. It has also ensured, for the most part, that counting errors have not marred the results or credibility of elections and, at least in *Pemilukada* disputes, that broader electoral processes have been free and fair.

Nevertheless, the real benefits to applicants of the Constitutional Court's decisions are not always readily apparent. As discussed in Chapter 5, the Court's decisions operate only prospectively and are not directed towards resolving concrete cases. They are, therefore, unlikely to provide any redress to applicants. Similarly, the Court's decisions have had a relatively small effect on the 'outcome' of most elections. In the 2004 DPR elections, for example, the

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Court's decisions affected only three seats.[1] As for the 2014 national legislative elections, the Court's decisions changed only one seat – in Sampang 2 district in Madura, after a Court-ordered recount resulted in 25,000 votes being declared invalid because they had not been properly initialled by polling station officials (Della-Giacoma and Junaidi, 2014). The Court's decisions have also minimally affected the *Pemilukada* election outcomes. By my count, the initial winners were displaced in only six of the 44 re-elections ordered by the Constitutional Court in 2008–2011.[2] Winners of the flawed or illegal initial *Pemilukada* often received *more* votes in the revote, despite the Court having found them responsible for serious violations of electoral laws, such as vote buying.[3]

Bringing cases is expensive and time-consuming for litigants in both constitutional review and electoral dispute cases. Though the Court charges no court fees, parties are responsible for their own legal fees, including for lawyers and witnesses, many of whom need to be brought into Jakarta to testify. Nevertheless, the Court has suffered no shortage of cases. Why, then, have so many parties continued using the Constitutional Court?

The answer seems to be that, expense aside, there is little to lose in bringing an electoral dispute before the Court. Parties have an opportunity to 'vent' frustrations about the electoral practices of their opponents, and to have their arguments considered by adjudicators who, except for Akil Mochtar, appear to have been largely impartial and competent. In this sense, the Court might operate as a pressure release valve, helping avoid electoral contests becoming violent. Only a handful of incidents of unrest have occurred after the Constitutional Court's many hundreds of electoral dispute cases (Somba, 2011), even though the Court rarely upholds challenges. This is impressive in the highly-charged political environments in which elections are held in Indonesia (Jakarta Post, 2013).

Perhaps, then, in practice, the primary benefit of Constitutional Court decisions in electoral dispute cases lies not in changing outcomes or allocating seats but

1 *Partai Demokrat* and *Partai Amanat Nasional* both gained and lost one seat from each other. *Partai Demokrat* lost one seat to *Partai Pelopor* in Papua. *Partai Bintang Reformasi* obtained one seat in West Kalimantan at the expense of *Partai Nasionalis Banteng Kemerdekaan*; and *Partai Damai Sejahtera* gained a seat in Irian Jaya from *Partai Persatuan Demokrasi Kebangsaan* (Berita Mahkamah Konstitusi, 2004).

2 Including the *Tebo Bupati* (2011); *Morotai Bupati* (2011); and *Gresik Bupati* (2010) election cases.

3 For example, the *South Tangerang Selatan Mayoral* (2010); *Sintang Bupati* (2010); *North Tapanuli Bupati* (2008); *Cianjur Bupati* (2011); and *Mandailing Natal Bupati* (2010) election cases.

the respect its decisions have gained with a wide range of parties. These include applicants, national and local election commissions, related parties, and even competitors in elections not involved in litigation before the Court.

These sentiments are reflected in the following extract, from the autobiography of founding Chief Justice Jimly Asshiddiqie (2008, p. 163):

> Even though the 2004 Election was our first experience in deciding electoral disputes, the Constitutional Court's decisions were broadly well-received. Not only did the applicants and respondents adhere to these decisions, but also the constituents and supporters and even the masses of the political parties. This is proved from the fact that negative reaction to these decisions was very minimal, including objecting to or challenging these decisions and demonstrations usually associated with decisions relating to political parties. For us, this phenomenon indicates that the Constitutional Court can be seen to have shown satisfactory performance by issuing decisions that were just and correct.
>
> The satisfactory resolution of disputes arising out of the 2004 Election by the Constitutional Court without upheaval from the elite or the grass roots [means that] it can be said that the Constitutional Court has succeeded in overseeing the process of democratisation in Indonesia. This performance of the Constitutional Court is an important factor in creating conducive conditions for the commencement of the tasks of the institutions of state established out of the 2004 Elections, whether the DPR, DPD or DPRD, President and Vice-president, in a smooth and orderly way.
>
> Alhamdulillah, one function of this new institution has been performed well. With the facilities we had, we attempted to perform our functions as best as possible. Within the restricted time frames we performed [these tasks] quickly and maintained the quality of processes and decisions.

And, while applicants in constitutional review cases are unlikely to obtain a personal benefit from any decision, bringing applications before the Court can be fruitful. Some applicants, for example, are probably genuinely altruistic in their motivations to effect real legal change. Others undoubtedly see the Court as an accessible forum in which to air public law grievances. Unlike Indonesia's highest court for non-constitutional issues, the Supreme Court, which rarely hears oral presentations of argument, the Constitutional Court's proceedings are transparent, being open to the public, often broadcast live on

the internet and on television, and usually attracting widespread media coverage.

Despite the many problems with the Court's decision-making that this book has highlighted, it seems that the Constitutional Court's decisions are, legally speaking, 'good enough' to satisfy the generally low concern for legal principle held by many Indonesian politicians and citizens alike. Although its decisions often raise controversy, this controversy is rarely, if ever, legal. In other words, the Court's decisions are rarely criticised for being poorly reasoned, but rather on the basis of their outcome. This is perhaps to be expected in a country whose Constitution has, for most of its independent history, been a rather nebulous document not previously applied or otherwise used to check government power. However, in my view, the Court must pay greater attention to developing a more robust body of jurisprudence and then apply it consistently. If it does this, then if and when the Court next becomes embroiled in scandal, it will be better able to withstand political attack.

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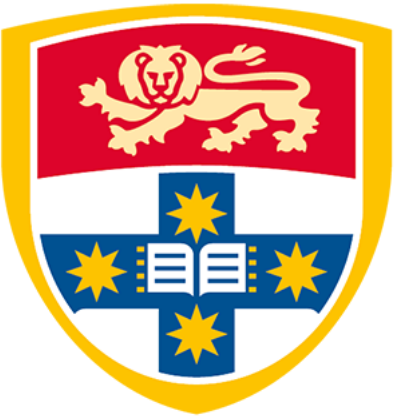

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